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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

HUMBLE OIL & REFINING COMPANY,

Petitioner

versus

I. R. PRICE, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Humble Oil & Refining Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered September 30, 1970, in Docket No. 26,968 of said Fifth Circuit.

OPINIONS BELOW

The opinion and the order on rehearing of the Court of Appeals are not yet reported. The opinion of the District Court is reported at 290 F. Supp. 408 (D.C. E.D. La. 1968). Copies of the opinion of the Court of Appeals on original hearing and on rehearing, as well as a copy of the opinion of the District Court, are annexed hereto as Appendix "A".

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on September 30, 1970. An extension of time until November 2, 1970, for petitioning for rehearing was granted on October 8, 1970. The petition for rehearing was filed on November 2, 1970, the order denying rehearing was rendered on December 8, 1970, and mandate issued December 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court sitting in an action based solely on diversity of citizenship, involving no federal question (and, therefore, wholly dependent upon state law) may substitute its judgment of what the law of the state **ought to be** for the law declared by the courts of the state.

2. Whether state law requiring a "putting in default" as a prerequisite to a claim for damages for alleged violation of an implied obligation to protect against drainage may be disregarded by a federal court by reason of the circumstance that the defendant-lessee is also the lessee of the adjoining property on which the allegedly draining wells are situated.

3. Whether an implied obligation, enforceable by damages, to petition the Commissioner of Conservation for forced pooling may be imposed by federal courts upon a mineral lessee when the state law has imposed no such obligation.

STATUTES INVOLVED

1. The Rules of Decision Act (as amended), 28 U.S.C. § 1652 provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."[1]

2. Articles 1911, 1930, 1931, 1932 and 1933 of the Louisiana Civil Code of 1870 dealing with "a putting in default" are annexed hereto and appear in Appendix "B".

STATEMENT OF THE CASE

I. *The Facts*

In 1933 the Federal Land Bank of New Orleans granted an oil, gas and mineral lease covering the leased premises to I. R. Price, one of the plaintiffs here. Mr. Price was a lease broker, and was acting as agent for Humble Oil & Refining Company ("Humble") on a "buying order" from Humble. (As a matter of fact, the majority of his work came from Humble.) The lease was on a printed form, then in general use in the area, and containing no unusual provisions. The Land Bank was a large landowner with experienced personnel looking after its mineral affairs, with the advice of house counsel. Mr. Price, with Humble's assistance in the form of rentals paid for two years in advance, later succeeded in getting the Land Bank to sell the land back to the Williams family,[2] for which he and Mr. Gayle (another plaintiff) received a mineral interest, the Land Bank reserving a quarter inter-

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[1] *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) holds that federal courts in diversity cases may not, as to non-federal matters, disregard state law (including case law) in matters of substantive rights. This principle applies also to decisions of intermediate appellate state courts. See, *e.g.*, *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

[2] Members of the Williams family were originally plaintiffs here, but dismissed their claims voluntarily. They are, however, plaintiffs in a companion lease cancellation suit in a state court.

est (either mineral or royalty).[3] Dep. I. R. Price, pp. 3-10; Dep. H. K. Waddell, pp. 3-7.

Humble entered on the leased premises and drilled the discovery well in the North Crowley Field — the well now known as Williams No. 1 — in 1937. A development program ensued in which the leased premises and adjoining leases were developed on a surface spacing pattern approximately 20 acres. By Pearl Harbor, 43 wells had been drilled in the field, and 9 on the leased premises.

As the development of the field progressed[4] it was determined that the field contained numerous producing reservoirs of various producing characteristics lying one on top of another like an asymetrical stack of pancakes that were thick in the middle and tapered to the ends. Some of the "pancakes" were cut off by faults and by shale barriers so as to make the "stack" even more irregular. Generally speaking, the Williams acreage is located on the flank, or the thinner portion of these reservoirs, although in some it enjoyed good position.

Humble eventually drilled 20 wells on the lands covered by the 1933 lease (for convenience sometimes referred to as the Williams lease), not including wells drilled on units in which Williams acreage was included, at a cost of more than $2,750,000.00. (Affidavit E C. Jett.) **No additional wells were needed to protect the leased premises from drainage.** (Plaintiffs' Answers to Interrogatories, No. 23.) Humble performed at least 46 workovers on the Williams wells in the shallow sands at an additional cost

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[3] The Land Bank still owns the largest single royalty interest under the lease granted by it.

[4] Still later in the course of development, it was found that still deeper reservoirs existed commencing in the Frio formation and extending downward. The damages sought in this case are restricted to 19 of the so-called shallow sands, that is, sands above the Frio.

of more than $1,000,000.00, prior to the filing of this suit. (Affidavit E. C. Jett.) In 1963, Humble decided to seek Conservation Department units affecting certain of the shallow reservoirs (sands above the Frio), and Commissioner's orders were issued pooling the Williams land with other lands as to certain of the reservoirs, effective April 1, 1964. From 1937 to April 1, 1964, royalties of more than $1,274,000.00 were paid by Humble to the persons claiming to be entitled thereto under the Williams lease. (Affidavit V. R. White.) This suit was filed in 1964.

Meanwhile, in 1955 certain questions as to the development of and production from the Williams lease had been raised by a consulting geologist or engineer employed by the Williams family. Letters were written and a conference was had. (Deposition Guy Johnston, pp. 4 and 5.) Matters appear to have rested until 1963 when plaintiffs and others, having entered into a litigious contract of employment with a Mr. Harang (a geologist) and certain attorneys (see *Williams v. Humble Oil & Refining Company*, 208 So. (2d) 699 (La. App. 1968), writ refused 252 La. 257, 210 So. (2d) 504), announced that the lease had terminated and demanded cancellation and the payment of large amounts for alleged drainage. Defendant denied that any substantial drainage had occurred and this suit (as well as companion suits in the state court) resulted.

II. *The Proceedings*

The present plaintiffs (and others who have withdrawn from the proceedings) filed this class action against Humble in the United States District Court for the Eastern District of Louisiana basing jurisdiction on diversity of citizenship and requisite amount in controversy (28 U.S.C. § 1332). The action sought (a) an accounting for alleged drainage of petroleum from beneath the leased premises

by wells on adjoining premises, or (b) damages for alleged failure to protect the leased premises from drainage. After long delays caused by the then-overburdened docket of the District Court, many preliminary skirmishes and much discovery (including the production by Humble of thousands of pages of documents), Humble moved for a summary judgment.

The motion was heard on a limited record designed to present issues of law which did not involve disputed issues of material facts. No hearing was had in (nor decision rendered by) the District Court on the disputed factual issues of whether substantial drainage had occurred; of whether, at the relevant times, Humble had knowledge of substantial drainage; of whether a reasonably prudent operator would have taken action to prevent drainage; or of whether Humble had been "put in default" in accordance with the provisions of the Louisiana Civil Code. These issues were not thought by Humble to be susceptible to decision by a motion for summary judgment and were not urged in connection with Humble's motion.

It was thought to be appropriate to submit to the District Court the legal issues of (a) whether the remedy of an accounting was available and (b) whether an express provision of the lease requiring written notice by the lessor of dissatisfaction with the lessee's performance (which notice had not been given) precluded the plaintiff's claim for damages.[5]

The District Court concluded that, as a matter of law, Price, *et al.*, could not be entitled to an accounting and entered summary judgment in Humble's favor on that

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[5] Other matters, not here pertinent, were also submitted. Humble does not, by confining this petition to the points made, waive its position as to such other matters.

claim. The District Court found that in order for Price, *et al.*, to recover damages they must prove by a preponderance of the evidence (a) that petroleum could have been produced from the same reservoirs from which production was obtained through wells drilled on adjacent property, (b) that this could have been done from additional completions in wells already drilled on the leased premises,[6] and (c) that it would have been economically feasible for Humble to make the additional completions. The District Court further concluded that the burden was on Price, *et al.*, to establish the quantity of petroleum that would have been produced from the additional completions and the value thereof had the completion been timely made.

However, the District Court went further and concluded that this suit is not barred by failure to comply with the notice provision of the lease and that whether it is barred is a question of fact for the jury. Also, the District Court concluded that the mineral lessee has a duty to act as a prudent administrator, and that if it is draining oil from the leased premises by a well on adjoining property, its duty as a prudent administrator **may** include a duty to unitize, a duty to offset or a duty to multiply complete, or all of these. The Court said that what action a prudent administrator would take under the circumstances is a factual question to be decided by the finders of fact.

Both Humble and Price, *et al.*, perfected interlocutory appeals to the United States Court of Appeal for the Fifth Circuit.[7] Oral argument was had in the spring of 1969

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[6] Price, *et al.*, have so limited their claim. (Tr. pp. 22-26.)

[7] It was hoped that this might eliminate the necessity of a long and expensive jury trial involving claims of drainage in some 19 separate reservoirs over a 25-plus year period, or, at worst would decide the legal questions involved in such a trial. The hoped-for saving in time turned out to be merely "the long way around".

and on September 30, 1970, the Court of Appeal handed down its decision. The decision affirmed the District Court's action in dismissing the claim for an accounting. It affirmed the District Court's view that the implied covenant to drill off-set wells included a duty to resort to the Department of Conservation for forced-pooling. The decision went further than that of the District Court and held that the express notice provision of the lease should be disregarded. The Court then went even further (although the issue was not urged by the motion) and decided, as a matter of law, and without benefit of evidence, that no "putting in default" was necessary where drainage occurred through wells drilled by the same lessee on adjoining premises because, the Court said, that amounted to an "active breach" of the lease.

Humble timely applied for rehearing, suggesting that such rehearing be had *en banc*, both of which were denied.

REASONS FOR GRANTING THE WRIT

I. *Preliminary Statement*

This proceeding is an unique attempt by plaintiffs, Price, *et al.*, who hold under the original mineral lessor, to mulct a lessee in damages for asserted failures to protect against drainage in some 19 reservoirs occurring over a period commencing in 1938. By the use of "20-20 hindsight", Price, *et al.*, have now informed the lessee, for the first time, that a certain well should have been drilled deeper in 1938, that a well should have been recompleted in 1944 in a different sand than the sand in which it was recompleted, that a well was improperly shut-in in 1952, and so on. After the case had been pending for several years and the pleadings closed (and after additional counsel had been employed) Price, *et al.*, added the novel con-

tention that even though all off-set wells needed to be drilled had been drilled, nevertheless the lessee owed the lessors an additional duty to proceed before the Louisiana Commissioner of Conservation for forced pooling although a reasonably prudent operator would not have off-set the well. It was also argued that the express notice provision of the lease was not applicable because the lessee was also the lessee of the allegedly draining tract.

The District Court "bought" these theories, but went further to assert that the question of whether notice should have been given either under the express notice provision or under the Louisiana law requiring a "putting in default" (which latter was not urged by Humble in its motion) was a question for the jury. The Court of Appeals added to the burden imposed on the lessee by the District Court by not only holding that the lessee might be under a duty to unitize (which is contrary to the lessee's duty as defined by Louisiana jurisprudence) but also that the questions of whether the express notice clause applied or whether a putting in default was necessary under state law were not for the jury, but for the court, and that, as a matter of law, the default resulting from failure to protect against drainage where the lessee was also the lessee of the adjoining tract created a greater duty on the lessee and rendered notice or a putting in default unnecessary because it constituted an "active breach" of the lease (which is contrary to the Louisiana Civil Code and to the express holding of the latest Louisiana decision).

This latter gratuitous judicial amendment of the Articles of the Louisiana Civil Code dealing with default and of the Louisiana jurisprudence thereunder is the matter to which this petition is primarily addressed; it is a palpable breach of the *Erie* principle. However, this petition

also covers the judicial innovation by the federal courts of an implied obligation to resort to forced pooling, which obligation is negated both by statute and by jurisprudence—again in violation of *Erie*. This is not the case in which the lower court lacked precise guidance from the Louisiana law; on the contrary, there were precedents in point which the lower court chose not to follow.

The continued viability of the *Erie* rule in the lower federal courts presents a matter of importance sufficient to warrant this Court's attention.

II. *The Appellate Court's Determination "As A Matter of Law" That "The Lessee's Actions Here Should Be Viewed As An Active Breach Of His Lease Obligations" Is Clearly Erroneous In That It is Directly Contrary To State Law And May Deny To The Lessee His Day In Court As To Whether There Was An Active Or Passive Breach.*

A. The holding of the Court of Appeals that the alleged breach of the lease is, as a matter of law, an active breach is directly contrary to a recent Louisiana appellate decision, the *Breaux* case[8] (on which the Court of Appeals otherwise relies), in that the holding here accords greater rights to the lessors (*i.e.*, the collection of damages without a putting in default) simply because of the circumstance that the lessee-defendant is also the lessee of the adjoining tract.

The Court acknowledges (Appendix, pp. A-12-13) the binding effect of *Breaux*. The Court quotes from that case's express holding, as follows (Appendix, p. A-13):

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[8] *Breaux v. Pan American Petroleum Corp.*, 163 So. (2d) 406 (La. App. 1964), writ den. 246 La. 581, 165 So. (2d) 481.

> "We conclude, therefore, that plaintiffs in this suit have **no greater rights** and **no different cause of action** against defendants-lessees simply because the defendants are also the lessees of the adjoining tract of land on which the alleged draining well is located." (Emphasis added.)

The Court then proceeds (Appendix, p. A-31) on the basis of the **dissenting** opinion in *Breaux*[9] and on the basis of Professor Hardy's **adverse criticism** of *Breaux*[10] to hold here that the lessor **does** have "greater rights" because the lessee is also the owner of the adjoining lease — the "greater rights" consisting of not being required — as the Louisiana law plainly requires — to put the lessee in default.

The holding in *Breaux* was plain. The holding here is plainly contrary. This is a plain violation of the *Erie* principle.

The Court of Appeals seeks to read out of *Breaux* this unequivocal holding by saying that default was not an issue in *Breaux* (Appendix, p. A-34). This is a distinction without a difference. What **was** at issue in *Breaux* was the general legal concept of whether or not ownership by the defendant lessee of the allegedly draining lease in any way imposes greater obligations on the lessee. *Breaux* holds categorically that it does **not**, which necessarily means that the same legal results should flow from the same situation, and that if such drainage is by a defendant lessee it is no more an active breach than drainage resulting from the act of a third party. Apparently it is

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[9] It should be noted that Judge Tate's dissent points out that "a mineral lessee is not without remedy to protect itself from the imposition of damages, **after it is put in default . . .**" by resorting to the Commissioner of Conservation. (163 So. (2d) at p. 423 Emphasis added.)

[10] 25 La. L. Rev. 360, 365.

the theory of the Court below that not only must the state law be a "white horse case" but that even a "white horse" is not binding should it not have a cast in one eye.

B. Even without *Breaux*, the Courts' holding is in contravention of the precise language of the Louisiana Civil Code and of a long line of state and federal cases. Articles 1911, 1930, 1931, 1932 and 1933[11] of the Louisiana Civil Code evidence a statutory scheme which shows that "not doing what was covenanted to be done" (Art. 1931) is a passive breach only. It was on the basis of the plain language of Article 1931 that the Court of Appeals **held**[12] in *Billeaud Planters Inc. v. Union Oil Co. of California*, 245 F. (2d) 14 (C.A. 5th, 1957), in a case involving a suit for damages for alleged drainage by a lessee who was also, as here, the lessee of the adjoining tract, that failure to protect against drainage was a passive, not an active breach. The Court (per Judge Borah) reached its decision on the basis of the clear meaning of the Louisiana Civil Code.[13]

In *Bennett v. Sinclair Oil & Gas Co.*, 405 F. (2d) 1005 (C.A. 5th, 1968), a case involving (among other claims) a claim for damages for drainage, the Court (per Judge Ainsworth) affirmed the District Court's holding that no damages could be collected without a putting in

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[11] For the convenience of the Court these Articles are reproduced in Appendix "B" hereto.

[12] The opinion's reference (see Appendix, p. A-32) to *Billeaud's* holding as "purest dictum" is, with due respect, inaccurate. In the District Court the precise defense was raised by the **lessee**, but the lower court found it unnecessary to decide it (144 F. Supp. 564, 572, n. 6.) On appeal, the **lessor** urged "active breach" as an excuse for non-compliance with the notice provisions. 245 F. (2d) 18.) The Court of Appeals decided the issue of active breach **before** it reached the issue of the notice provision.

[13] The fact that a 1910 construction contract case was cited is no ground for questioning the validity of the opinion. Many Louisiana mineral cases could have been cited. See, *e.g.*, *Brown v. Sugar Creek Syndicate*, 195 La. 865, 197 So. 583 (1940); *Temple v. Lindsay*, 182 La. 22, 35, 161 So. 8, 12 (1935); *Pipes v. Payne*, 156 La. 791, 101 So. 144 (1924).

default. The United States District Court for the Western District of Louisiana, following *Breaux*, had held that a cause of action for damages for drainage could exist, but that, since the failure to protect against drainage was merely a passive breach, a putting in default was required. (275 F. Supp. 886, 894-5 (D.C. W.D. La. 1967.) As in *Billeaud*, the District Court cited and relied upon the Louisiana Civil Code. The District Court took cognizance of the suggestions of Professor Hardy in 25 La. L. Rev. 360, 365 (relied upon by the opinion here) but found it unnecessary to pass upon the point.

In *Iberia Oil Corporation v. Texas Crude Oil Company*, 212 F. Supp. 941, 944 (D.C. W.D. La. 1963), aff'd (*per curiam*) 328 F. (2d) 832 (C.A. 5th, 1964), the District Court pointed out that the obligations claimed to have been violated were "implied and not express" and said:

> "Before cancellation or forfeiture of the agreement may be claimed for passive breach of an implied obligation, under the law of this State, it was incumbent on plaintiff to put defendant in default."

Whenever the obligation is an implied obligation it would appear that there can be no "active breach" because the claimed breach may not be said to be inconsistent with the contract—particularly when no one even dreamed of such an implication when the contract was written. How can there be a "wilful failure to perform" an obligation that was not in existence when the claimed breaches occurred in 1938, 1940, 1946, *etc.*?

The Court of Appeals relies here on the "failure to pay royalty" cases of *Bollinger*,[14] *Melancon*,[15] *Pierce*[16] and

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[14] *Bollinger v. Texas Co.*, 232 La. 637, 95 So. (2d) 132 (1957).
[15] *Melancon v. Texas Co.*, 230 La. 593, 89 So. (2d) 135 (1956).
[16] *Pierce v. Atlantic Refining Co.*, 140 So. (2d) 19 (La. App. 1962).

Bailey[17] (Appendix, p. A-31). It should be remembered that failure to pay royalty is a violation of an **express** obligation of the lease, not an implied obligation, and, even then, characterization of the failure as an active breach is the exception rather than the rule, for the breach is usually merely passive.[18]

C. Be all that as it may, and whether or not Humble is correct as to the effect of the state law, the Court's conclusion here that *Bollinger*, *Melancon*, *Pierce* and *Bailey* require the finding, in the total absence of an evidentiary hearing below, that "the lessee's action here should be viewed as an active breach of his lease obligations" (Appendix, p. A-31) is wholly unwarranted. In **each** of the cited cases the determination of the existence of an "active breach" came **after** a trial on the merits in which the facts relating to the breach were ventilated. In **each** opinion cited, the respective court recognized that if reasonable grounds for the breach had been shown **by the evidence** the breach would not have been deemed "active" and a putting in default would have been necessary, and **each** was decided on the basis of the facts adduced.

The effect of the decision of the Court of Appeals on this issue is to decide in a vacuum that the lessee has "knowingly and affirmatively acted in a manner inconsistent with his obligation" without hearing evidence on which to base this **fact** determination. To decide whether a lessee in 1940 "knowingly" failed to comply with an obligation not yet invented without permitting him to introduce evidence as to the circumstances existing at the time, the knowledge available, the customs and practices of lessor

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[17] *Bailey v. Meadows*, 130 So. (2d) 501 (La. App. 1961).

[18] *Bonsall v. Humble Oil & Refining Company*, 201 F. Supp. 516 (D.C. W.D. La. 1961), aff'd (*per curiam*) 300 F. (2d) 150, cert. den. 371 U.S. 816; *Touchet v. Humble Oil & Refining Company*, 191 F. Supp. 291 (D.C. W.D. La. 1960).

and lessee at the time, *etc.*, is effectively to deny to him a fair hearing and due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Again, there is here no express provision in the contract, which a man must disregard at his peril. The obligation, if it exists, is implied, and conforms to the test of reasonableness. If, under the facts, a reasonably prudent operator in 1940 would not have drilled an offset, or applied for unitization, or taken other action to protect against drainage, there could not have been an active breach in 1940 of the contract and a putting in default would have been required. What the opinion here does is to create, retrospectively and without the benefit of an evidentiary hearing, a factual situation which did not exist at the time and then use that assumed situation to impose on the lessee a greater burden, and give the lessor greater rights than existed when the asserted breach occurred. *Cf. Breaux, supra,* n. 8.

III. *The Decision Of The Court Of Appeals Violates The Erie Rule By Imposing Upon The Lessee A Different Obligation To Protect Against Drainage Than That Imposed By Louisiana Law.*

The decision appears to impose on a mineral lessee, retrospectively, an implied obligation, foreign both to received Louisiana law and to the customs of the Louisiana producing industry over the thirty-odd years here involved, to resort to the Commissioner of Conservation for forced pooling. This new implied obligation is derived, not from definitive Louisiana jurisprudence, nor from industry custom, but from the academic speculations of certain law review articles[19] and some admitted *obiter* in *Breaux*. It

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[19] Hardy, *The Work of the Louisiana Appellate Courts for the 1963-1964 Term*, 25 La. L. Rev. 360, 365; Hardy, *Drainage of Oil and Gas From Adjoining Tracts — A Further Development*, 6 Nat. Res. J. 45 (1966).

is directly contrary to the last decision[20] of the highest court of Louisiana defining the obligation to protect against drainage. It is directly in conflict with the holding of the most recent Louisiana appellate court decision.[21] It is directly contrary to the prior jurisprudence of the federal courts in Louisiana.[22] It is even contrary to the regulatory system adopted by the Louisiana Department of Conservation.[23]

The affirmance by the Court of Appeals of the District Court's conclusion of law in this regard appears to be based in large part on a misapprehension of the holding in *Breaux*. The opinion states (Appendix, p. A-13):

> "*Breaux* makes it clear that a cause of action for damages can be predicated as much upon the lessee's failure to seek unitization as upon the more commonplace failure to drill offset wells or completion."

With due respect, *Breaux's* **holding** does no such thing. While the appellate court in *Breaux*, in self-acknowledged dictum, did speculate (163 So. (2d) at p. 415) that it was "conceivable" that a lessor might be entitled to recover damages by alleging and proving that the lessee could have created a pooled unit, nevertheless the court maintained the exception of no cause of action. What the court did hold was that the lessor had no greater rights against the lessee by reason of the lessee's ownership of the adjoining lease (163 So. (2d) at p. 417).

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[20] *Coyle v. North American Oil Consolidated*, 201 La. 99, 9 So. (2d) 473 (1942), holding that the covenant is to off-set.

[21] *Breaux v. Pan American Petroleum Corporation*, 163 So. (2d) 406 (La. App. 1964), writ denied 246 La. 581, 165 So. (2d) 481, holding that the obligation is to off-set.

[22] *Billeaud Planters, Inc. v. Union Oil Co. of California*, 245 F. (2d) 14 (C.A. 5th, 1957), holding that failure to off-set is a passive breach only.

[23] See Order No. 29(E), La. Department of Conservation (1957) which finds it to be unnecessary to apply for unitization until after four wells have been drilled or after one year from first production.

The **holding** in *Breaux* did not depart from the Louisiana Supreme Courts' holding in *Coyle v. North American Oil Consolidated*,[24] which the Court in *Breaux* was bound to follow, and which it cited. In *Coyle* (which likewise involved a common lessee) the Louisiana Supreme Court established the law of Louisiana to be that the extent of the obligation to protect against drainage is to drill offset wells. *Breaux* has not changed this.

The opinion here assumes the existence of knowledge on the part of a lessee that did not exist when the field was initially developed. When the instant field was developed it was the custom of the industry, acquiesced in by the lessors, to guard the lease line by a fence of wells (which was done here).[25] If for one reason or another a well could not be off-set in the same sand but another sand was found productive, it was the custom of the industry, acquiesced in by the lessors, to complete the well in the other sand and achieve substantial equity by allowing one possible drainage to balance the other possible drainage. So long as each party received its fair share of current production no complaint was made, just as none was made here until this lawsuit was promoted by the holder of a litigious contract.

When a field has been developed and produced by this method to the knowledge of all parties, it places an unfair burden on the lessee to say to him, by means of hindsight,[26] that he owed an obligation, newly created, to develop the field on a unitized basis when it had already been devel-

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[24] *Supra*, n. 20.

[25] The history of the development of the shallow sands and of the relevant industry customs and conservation practices are recounted in Exhibit "A" to Humble's sworn Answers to Plaintiffs' Interrogatories (Set No. 4, Revised) filed December 20, 1968, and are not rebutted.

[26] The operator's conduct "is to be judged by foresight and not hindsight." *McDonald v. Grande Corporation*, 214 So. (2d) 795, 802 (La. App. 1968).

oped on a lease basis. And particularly is this so when the lessor here was a large corporation, knowledgeable in mineral matters, keeping abreast of development, and making no complaint until long after most of the events now complained of had occurred.

Resort to unitization is not a one-way street. The lessor here might have had to surrender to the lessors on adjoining tracts substantially more royalty production in one sand than it would gain from another, and so on. If the royalty owners wished for unitization they have at all times possessed the means[27] and the knowledge to provoke it themselves. They did not even suggest this claim until long after this suit had been filed and a great deal of preliminary matters had been completed.

It is respectfully submitted that the Court of Appeals has deserted the holdings of the Louisiana jurisprudence, in violation of the *Erie* rule, in placing reliance on admitted *obiter* and academic speculation and has devised a new and impracticable obligation which will create chaos for the past and trouble for the future.

Because the producing industry had no warning of the imposition of this novel obligation, it can do nothing, retrospectively, to protect itself against the flood of damage suits that will inevitably result if the decision of the Court remains as written, even though it had scrupulously complied with the express terms of its contract and with the implied obligation to drill offset wells announced by Louisiana's highest court. The effect of the Court's decision is akin to changing the rules of a game after the game is ended so as to penalize a participant for complying with the rules in effect while the game was being played. The lease here in question was fully developed long before

[27] La. R.S. 30:6(f) expressly gives a lessor, landowner or royalty owner the right to have a forced-pooling hearing called.

any of the law review articles in question were written, even before there was general use of forced unitization by lessees, yet the decision herein appears to impose an absolute obligation for not doing that which neither the law nor industry custom then required.

CONCLUSION

This petition presents obvious deviations from the *Erie* principle which this Court should correct, lest the principle, through erosion, be permitted to waste away. The Court of Appeals, being over-persuaded by theoretical law review articles, denied effect to Louisiana statute and case law and developed for itself what may become a "federal law" of drainage and default. In order to accomplish this end it found it necessary to make sophistical distinctions as to existing state law and to disregard the plain meaning of decisions of the state courts. Such should not be permitted.

Petitioner therefore respectfully submits that a writ of certiorari should issue herein to review the aforesaid judgment and that, after due proceedings had, said judgment should be reversed and the case remanded with instructions to conform to the law of Loiusiana in the respects herein described.

All of which is respectfully submitted.

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APPENDICES

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26968

FLOYD WILLIAMS, FREDERICK C. WILLIAMS, ET AL,
Plaintiffs-Cross Appellees,

I. R. PRICE, EDWARD H. TAUSSIG and EDWIN F. GAYLE,
Plaintiffs-Appellants-Cross Appellees,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(September 30, 1970)

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

WISDOM, Circuit Judge: This is a class action filed by plaintiff landowners[1] against Humble Oil & Refining

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[1] As the title of this case indicates, two Williamses and three Freelands were also plaintiffs and appellants. The Williamses and the Freelands have had the action voluntarily dismissed as to their interests. The remaining plaintiffs in this class action are Messrs. Price, Taussig and Gayle, who are mineral or royalty owners. The class was composed of some 76 mineral and royalty owners. *See* Williams v. Humble Oil & Ref. Co., E.D. La. 1964, 234 F. Supp. 985.

Company, their mineral lessee, seeking an accounting for the alleged drainage of oil and gas from beneath their leased premises caused by Humble's operations on adjoining premises. In the alternative, the plaintiffs seek damages for the alleged breach of Humble's implied obligation to exercise reasonable diligence to protect their property from drainage. Federal jurisdiction is based upon diversity of citizenship under 28 U.S.C. § 1332. The principles therefore to be applied in this case are determined by the law of Louisiana. *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

After protracted preliminaries, Humble moved for summary judgment. The district court concluded that the plaintiffs were not entitled to an accounting and therefore granted Humble's motion for summary judgment on that issue. The court denied Humble's motion for judgment on the issues relating to the cause of action for damages.[2] *Williams v. Humble Oil & Ref. Co.*, E.D. La. 1968, 290 F. Supp. 408. The plaintiffs appealed of right. Humble appealed under 28 U.S.C. § 1292(b) from that part of the district court's order denying its motion for summary judgment. We affirm.

In 1933 the Federal Land Bank of New Orleans granted an oil, gas, and mineral lease to I. R. Price, one of the plaintiffs, covering the Williams property in Acadia Parish, Louisiana. The lease was on a printed form and contained provisions then in common use. Price, a lease broker, acted as an agent for Humble; indeed, he soon assigned the lease to Humble. With the use of Humble's prepayment of two years rentals, Price persuaded the Land

[2] These issues are: (1) Notice as a prerequisite to the action; (2) the effect of the express offset provision of the lease; (3) recognition of the lessee's implied obligation to protect the lessor against drainage.

Bank to sell the leased premises back to the Williams family, from whom it had been acquired. The Land Bank reserved a quarter interest in the minerals. The Williams family granted Price and another plaintiff, Edwin F. Gayle, mineral interests in the leased property in return for their services.

In 1937 Humble brought in its discovery well in the North Crowley field now known as Williams No. 1. As of March 1, 1964, Humble had drilled twenty wells on the leased premises at a cost of more than $2,750,000. These wells were drilled in a surface spacing pattern containing approximately twenty acres per well. Production of oil and gas from the leased premises is still continuing, and the plaintiffs and others who share in royalties payable under the 1933 lease have received payments from the date of first production to March 1, 1964, of more than $1,274,000. The gross value of the oil and gas recovered from the Williams property in those years exceeded $10,192,000.

The plaintiffs' contentions in this case relate only to the shallow sands, those located above the Frio. As of March 1, 1964, Humble had performed at least 46 workover operations on the wells producing from the shallow sands at a cost of more than $1,000,000. In addition, Humble applied to the State Conservation Department for units affecting certain of the shallow reservoirs, and in 1963 unitization orders were issued pooling the Williams property with other lands overlying the shallow reservoirs.

The plaintiffs contend that their property is being drained by Humble's operations on the adjacent premises. The district court found that there are two unit wells, in the production of which the plaintiffs share, situated on

adjoining property within 150 feet of the Williams tract. There are no other wells on adjacent premises located within 150 feet of the Williams property. Nevertheless, the plaintiffs urge that Humble should have taken steps — either by multiple completions or forced pooling — to prevent their land from being drained and that those steps would have been economically feasible for the company.

The questions for review are these: (1) Were the plaintiffs entitled to an accounting? (2) What is the nature and extent of the lessee's implied obligation to protect the leased premises from drainage? (3) Does an express offset provision in the lease preclude the implication of a further duty upon the lessee to protect against drainage? (4) Does the plaintiffs' failure to comply with a notice provision in the lease bar their cause of action for damages?

I.
ACCOUNTING

The plaintiffs contend that because Humble failed to exercise reasonable diligence to prevent their property from being drained, it must account to them for that fraction of production on the adjacent property that is attributable to the drainage.[3]

In granting Humble's motion for summary judgment on this cause of action, the district court held that under Louisiana law the plaintiffs' proper remedy is an action to recover damages. "A creditor, as such, has no right to an accounting in Louisiana". 290 F.Supp. at 412-13. We

[3] These plaintiffs argue that Humble by its tardy applications for unitization declared that it is taking oil and gas from the plaintiff's land through wells it drilled on other land. Humble accounts for oil and gas taken since unitization. The plaintiffs contend that it should also be made to account for oil and gas so taken and so taken to its knowledge before it made the fact known through unitization applications.

agree with the result and affirm the judgment. We hold that in the circumstances of this case, the plaintiffs have no action for an accounting. We do not go so far as to say that in Louisiana a mineral lessor is a mere creditor or that mineral lessors never have a right to an accounting from their lessee.

Humble's arguments rest on the incontestable principle that a Louisiana landowner neither owns the minerals beneath his land nor has any right to the oil and gas produced on adjoining property. Humble's position is that an accounting is available only to one who has a property interest in the subject matter of the suit.

It is quite true that Louisiana adheres to the non-ownership theory of oil and gas; thus only upon drilling and reducing the minerals to possession does the Louisiana landowner become vested with ownership. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 1922, 150 La. 756, 91 So. 207. It is also true that under the rule of capture a landowner may produce as much oil and gas as he can from a well bottomed on his land and need not account to his neighbor if he drains oil and gas from beneath his neighbor's land. *Louisiana Gas & Fuel Co. v. White Bros.*, 1925, 157 La. 728, 103 So. 23; *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 1919, 145 La. 233, 82 So. 206. Nevertheless, we consider that these principles are not determinative of the issue. It is unsettled in Louisiana what right the plaintiff must possess in order to maintain an action for an accounting. The landowner's exclusive right to explore his land and drill for oil or his right under a lease to one-eighth of gross production in certain circumstances may be sufficient interests to entitle him to an accounting.[4]

[4] In McCoy v. Arkansas Natural Gas Co., 1932, 175 La. 487, 143 So. 383, the Supreme Court of Louisiana stated that the owners have

It would be a mistake to think that a Louisiana landowner may never compel an accounting by his mineral lessee. Indeed, we have been able to find several oil and gas cases in which Louisiana courts have ordered an accounting. *E.g. Fontenot v. Sunray Mid-Continent Oil Co.* (La. App. 3d Cir. 1967) 197 So.2d 715; *Mire v. Hawkins,* (La. App. 3 Cir. 19) 177 So.2d 795; *Davies v. Texarkana Crude Oil Co.,* 1923, 154 La. 424, 97 So. 597; *Harris v. J. C. Trahan Drilling Contractor, Inc.,* La. App. 2d Cir. 1964, 168 So.2d 881; *Pierce v. Atlantic Ref. Co.,* La. App. 3d Cir. 1962, 140 So.2d 19; *Bailey v. Meadows,* La. App. 2d Cir. 1961, 130 So.2d 501. Each case, however, follows a well-defined pattern, typically an action by the lessor to cancel his mineral lease on the ground of nonpayment of royalties. If the court orders cancellation of the lease, it may also direct the lessee to account to the plaintiff for the royalties earned until cancellation. *See Davies v. Texarkana Crude Oil Co.; Fontenot v. Sunray Mid-Continent Oil Co.; Pierce v. Atlantic Ref. Co.; Bailey v. Meadows.* Even if the court rejects the lessor's demand for cancellation because nonpayment was excusable, plaintiff is still entitled to an accounting of royalties that have accrued under the terms of the lease. *See Mire v. Hawkins; Harris v. J. C. Trahan Drilling Contractor, Inc.* Thus at least in oil and gas lease cancellation cases an accounting is ancillary to the action and exists for the equitable purpose

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an exclusive right to drill and reduce minerals to possession and that that right is as well entitled to the protection of the law as is the ownership of corporeal property.

In a number of ways the Conservation Law of Louisiana (Act 157 of 1940 - R.S. 30:1, et seq.) has recognized the incidents of ownership with respect to oil and gas before its production. "Owner" and "producer" are defined in Section 3 as follows:

For example,

(8) " 'Owner' means the person who has the right to drill and produce from a pool and to appropriate the production either for himself or for others.

"(9) 'Producer' means the owner of a well capable of producing oil or gas or both."

of adjusting in one proceeding all the differences between the parties arising from the main cause of action.[5]

For many years in Louisiana the existence of a cause of action based on drainage was in doubt. Finally the case of *Breaux v. Pan American Petroleum Corp.*, La. App. 3d Cir. 1964, 163 So.2d 406, established the right of a landowner to recover damages from his lessee for breach of the lessee's implied obligation to exercise reasonable diligence to prevent drainage. The plaintiffs are right, of course, when they argue that *Breaux* merely held that an action for damages lies; it did not hold that an action of accounting will not lie. Nevertheless, we believe that an action for damages based on drainage and an action for an accounting are fatally incompatible in a way that an action for cancellation and an accounting are not.

The district court correctly enumerated the elements of an action for damages that *Breaux* requires the landowner to prove. 290 F. Supp. at 411. In the ordinary drainage case the plaintiff must prove first that substantial drainage has occurred and that offset wells drilled on his premises could have produced oil and gas from the same reservoirs as those from which production was actually

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[5] Authority for the equitable adjustment of the parties' differences can be found in Article 21 of the Louisiana Civil Code: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." *See* Miller v. Kellerman, W.D. La. 1964, 228 F. Supp. 446, 464. In that case Judge Hunter also found support for the accounting in Article 1965: "The equity intended by this rule is founded in the christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity." See also Art. 2037: "Manner of performance of conditions. Every condition must be performed in the manner that it is probable that the parties wished and intended that it should be."

obtained through the draining wells. Second, he must prove that it would have been economically feasible for the lessee to drill such offset wells. Finally, he must prove "with some degree of certainty" the quantity of oil and gas that would have been produced from the offset wells and the value of his share of that production. *Breaux v. Pan American Petroleum Corp.*, 163 So.2d at 415.

It is this last requirement that makes an accounting incompatible with an action for damages under the rule in *Breaux*. By means of an accounting the plaintiffs seek to shift to Humble the burden of proof on the issue of damages imposed on them by *Breaux*. They would have the court require Humble to calculate and present to them the quantity of oil and gas drained from beneath their land. This conflict, however, does not arise in the situation in which a plaintiff seeks cancellation of a lease based upon nonpayment of royalties. In that case the plaintiff's right to cancellation depends not on the amount of royalties but rather on the lessee's failure to pay *any* amount of royalties without a valid justification. *See Bollinger v. Texas Co.*, 1957, 232 La. 637, 95 So. 2d 132, 136. Thus once the fact of unexcused nonpayment is proved and cancellation awarded, it is appropriate, in order to afford full and complete relief, to require the lessee to account for the accrued royalties. *Davies v. Texarkana Crude Oil Co.*, 1923, 154 La. 424, 97 So. 597, 598.

The *Breaux* case establishes that if the plaintiffs can prove the elements of the cause of action, they are entitled to damages from Humble for breach of its implied obligation to exercise reasonable diligence to protect the property from drainage. But they must prove "with some degree of certainty" the quantum of harm suffered. Since an order of accounting would require Humble to deter-

mine the amount of oil and gas drained, it is inconsistent with the rigorous burden of pleading and proof that *Breaux* places on aggrieved landowners. Thus we conclude that in oil and gas cases the Louisiana courts would confine an action of accounting to that situation in which the lessee unjustifiably fails to pay his lessor royalties produced from wells drilled on the lessor's land.

II.

THE NATURE AND EXTENT OF THE LESSEE'S IMPLIED OBLIGATION TO PROTECT AGAINST DRAINAGE

In the alternative, the plaintiffs sued for damages for breach of Humble's implied obligation as their mineral lessee to exercise reasonable diligence to protect the plaintiffs' property from drainage of oil and gas. The district court, denying Humble's motion for summary judgment in relation to the cause of action for damages, reached the following conclusion of law.

> 5. A mineral lessee has a duty to the mineral lessor to act as a prudent administrator of the leased premises. If the lessee is draining oil or gas from beneath the leased premises by a well drilled by the lessee on other property, its duty to act as a prudent administrator may include an implied obligation to unitize the leased premises with those from which production is being obtained, or to drill an offset well, or to effect an offset completion of a well already drilled on the leased premises, if these acts are economically feasible . . . or to do those other things, if any, that a prudent administrator would do under the circumstances. What action a prudent administrator would take under the circumstances is a factual question to be decided by the finder of fact in the light of the relevant evidence.

290 F. Supp. at 411-12.

On appeal neither side is satisfied with that conclusion. The plaintiffs urge this Court to hold that as a matter of law a mineral lessee, upon discovery of drainage from beneath the leased premises, has an affirmative duty to unitize the leased premises with those to which the oil or gas is draining, or to inform the lessee of the drainage so that he may seek unitization, or to drill an offset well, or to effect an offset completion of a well already drilled on the leased premises, if these acts are economically feasible. Humble, on the other hand, argues first that the inclusion in the lease of an express provision dealing with drainage precludes the implication of any other obligation to protect the leased property from drainage. Second, Humble argues that as a matter of law in Louisiana the extent of its obligation to protect against drainage is limited to drilling offset wells or completions and that it would be both unfair and unwise to impose any new obligation. We deal with Humble's first contention in Section III of this opinion.

The general rule in Louisiana is that the landowner has no cause of action for damages against the owner of the adjoining property or his lessee for drainage of oil and gas from beneath his land. *Louisiana Gas & Fuel Co. v. White Bros.*, 1925, 157 La. 728, 103 So. 23; *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 1919, 145 La. 233, 82 So. 206. That rule is based on the concept that oil and gas — fugacious substances — are not subject to ownership in place. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 1922, 150 La. 756, 91 So. 207. Thus the Louisiana landowner may drill wells on his property and capture as much oil and gas as he can, even though he may draw some of his production from his neighbor's land.

A different situation obtains, however, when the party

whose production on adjacent premises is also the plaintiff's lessee. In that case a cause of action for damages lies based on the contractual relationship between lessor and lessee and the lessee's codal obligation to act as "a good administrator". In an oil and gas lease the landowner/lessor surrenders to the lessee his exclusive right to drill for oil in return for a percentage share in the gross proceeds of production. When the lessee acquires the lease, he also assumes a number of obligations, one of which is a duty to protect the leased premises from drainage. When drainage does occur, the landowner's judicial remedy is then an action against the lessee for damages or cancellation of the lease for breach of his implied obligation to protect against drainage.[6]

For many years the existence of this remedy against the mineral lessee was in doubt in Louisiana.[7] In 1929 in *Swope v. Holmes*, 169 La. 17, 124 So. 131, the Louisiana Supreme Court granted a landowner cancellation of his lease because the lessee had drilled wells on adjacent property that were draining the leased premises. Yet as late as 1964 it was accurate to say that the Louisiana courts, for one reason or another, had never awarded damages for drainage.[8] Nevertheless, in several cases, although relief was denied, the court assumed the existence of the remedy. E.g., *Billeaud Planters, Inc. v. Union Oil Co. of California*, W.D. La. 1956, 144 F. Supp. 564, 569, *aff'd*, 5 Cir. 1957, 245 F.2d 14; *Roberts v. United Carbon Co.*, 5 Cir. 1935, 78 F.2d 39, 42; *Coyle v. North American Oil Consol.*,

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[6] See Arata, Louisiana Law of Drainage, in Eleventh Ann. Inst. on Mineral Law 46, 47 (1964).

[7] Hardy, Drainage of Oil and Gas From Adjoining Tracts — A Further Development, 6 Nat. Res. J. 45 (1966).

[8] Arata, *supra*, note 6, at 51. See also Billeaud Planters, Inc. v. Union Oil Co. of California, W.D. La. 1956, 144 F. Supp. 564, 569, *aff'd*, 5 Cir., 1957, 245 F.2d 14.

1942, 201 La. 99, 9 So.2d 473, 475-76; *Louisiana Gas Lands v. Burrow*, 1941, 197 La. 275, 1 So.2d 518, 521-22.

The issue is no longer an open one in Louisiana. In *Breaux v. Pan American Petroleum Corp.*, La. App. 3d Cir. 1964, 163 So.2d 406, *writ denied*, 246 La. 581, 165 So. 481, the court said that

> we know of no reason why a landowner would not be entitled to recover from his mineral lessee the damages which the lessor has sustained as the result of a breach of the implied obligation on the part of the lessee to exercise reasonable diligence in endeavoring to prevent substantial drainage of the leased premises. We think the lessor under those circumstances would have a cause of action for damages for breach of a mineral lease contract just as he would for breach of any other contract.

163 So.2d at 415.

If there is no longer any doubt about the existence of the duty, there is still — as the present lawsuit illustrates — question as to the nature and extent of the lessee's obligation to protect against drainage. We hold that on this issue the district court correctly stated the law of Louisiana:

> [T]he mineral lessee who is leasing adjacent tracts and is producing oil or gas from a well on one tract that drains the other has a duty to act as a prudent administrator in order to protect the owner of the tract being drained by taking such steps as a prudent administrator would take under the circumstances then prevailing.

290 F. Supp. at 422.

Whether on a particular set of facts the lessee has breached his duty is a question for the trier of fact. To

recover damages for breach of the implied obligation to protect from drainage, the plaintiff in Louisiana must show

> (1) that substantial drainage has occurred, (2) that the lessee could have prevented the drainage without sustaining an economic loss and (3) an amount of royalties that the landowner would have received had the lessee taken appropriate preventive measures.

Id. at 419.

In *Breaux* the Court declared:

> We conclude, therefore, that plaintiffs in this suit have no greater rights and no different cause of action against defendants-lessees simply because the defendants are also the lessees of the adjoining tract of land on which the alleged draining well is located.

But the fact that the lessee himself is causing the damage has an important bearing on the proof of the lessee's knowledge of the drainage and on the steps the lessee is capable of taking to prevent or diminish drainage.

Breaux makes it clear that a cause of action for damages can be predicated as much upon the lessee's failure to seek unitization as upon the more commonplace failure to drill offset wells or completions. In the ordinary drainage case the plaintiff must allege and prove that the lessee could have produced oil and gas from the same reservoir by offset wells or completions drilled on the leased premises and that it would have been economically feasible for the lessee to drill such wells. He must also allege and prove the quantity of oil and gas that would have been produced from such a well and the value of his share of production. The plaintiff may also recover damages, however, if he alleges and proves that the lessee could have

created a pooling unit under which plaintiff would have participated in the production from the reservoir, but that he failed to do so. Damages in that case would be limited to the amount plaintiff would have received from such a unit. 163 So.2d at 415-16. Moreover, drilling offset wells, completions, and unitization do not exhaust the possible ways in which the lessee might discharge its duty to protect against drainage. Indeed, if he deems it inadvisable or unprofitable to drill offset wells or unitize the premises, the prudent administrator should perhaps disclose the fact of drainage to the lessor so that he may apply to the Louisiana Commissioner of Conservation for the establishment of a drilling unit.[9] In appropriate circumstances failure to make a full disclosure may provide the basis for a cause of action for damages.

In addition to the precedental effect of *Breaux*, sound policy reasons support the decision not to limit the lessee's duty to protect against drainage by drilling offset wells.[10] Admittedly, the implied obligation to protect against drainage has long been thought of solely in the context of drilling offset wells. The emphasis on that mode of protection was understandable in the early years of the oil industry.

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[9] Under La. Rev. Stat. § 30:6F the lessor himself may seek a hearing to determine whether a drilling unit should be formed. Because administrative relief is thus available to both the lessor and lessee, it could be argued that the lessee should not have to assume the burden of applying for unitization. Professor Hardy, however, points out the weakness of this argument:

> one of the principal motivations of any lessor in executing a lease contract is to shift the burdens of development and administration to the lessee. Therefore, the mere fact that the possibility of applying for unitization is open to the lessor should not alter the basic obligation of the lessee in this regard.

Hardy, note 7, at 48-49 n. 13.

[10] Many of the arguments that follow have been articulated in two enlightening articles on the *Breaux* decision by Professor George W. Hardy, III, of the Louisiana State University School of Law. *See* Hardy, The Work of the Louisiana Appellate Courts of the 1963-64 Term —Mineral Rights, 25 La. L. Rev. 360 (1965); Hardy, Drainage of Oil and Gas From Adjoining Tracts — A Further Development, note 7.

The rule of capture effectively precluded resort to the courts to prevent drainage; thus the drilling of a well to offset each of the draining wells on adjacent property was the only method available to lessees to fulfill their obligation. Conservation laws, however, have added at least one other self-help remedy to the lessee's repertoire, forced pooling or unitization. It is reasonable to require that the lessee, as a prudent administrator, utilize all the methods available to him to prevent drainage.[11]

To require the lessee in certain circumstances to seek unitization will not place an unfair burden upon him. Indeed, the concept of a duty to unitize is thoroughly compatible with the "prudent administrator" standard governing his conduct with respect to other implied covenants. The lessee may always defend a suit based upon his failure to unitize by showing that a prudent operator would not have formed a unit or that he had attempted without success all reasonable means to establish a unit or that the costs of unitization would not leave him a profit.

Moreover, from the point of view of the landowner, recognition of a duty on the part of the lessee to unitize in circumstances in which a prudent administrator would do so can afford significant protection against drainage of valuable reserves. Especially is this so in cases when it would be unprofitable — or perhaps even impossible because of spacing regulations — for the lessee to drill additional wells. In those circumstances the lessee's contribution to the cost of a unit well may be recoverable from his share of unit production, and the lessor will be saved at least part of his mineral reserves. When the lessee him-

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[11] *Cf.* George, The Impact of Conservation Laws and Decisions Upon the Mutual Obligations of the Mineral Lease, 24 La. L. Rev. 571, 576 (1964).

self is doing the draining on adjacent land, the argument for unitization is even more compelling. The lessor in that case can get adequate protection against drainage without further cost to the lessee, whose drilling costs are already incurred. Thus he need only divide the royalty interest among the pooled landowners. It is true that any recovery of damages by the lessor for the lessee's failure to unitize, coming on top of a full royalty payment to the adjacent landowner, will decrease the lessee's profit — or perhaps turn a marginally profitable well into a losing enterprise. But if the lessee had originally exercised the requisite diligence to prevent drainage, the added "cost" would not have been incurred. As Professor George W. Hardy, III, points out, "if there is a penalty involved here for the lessee, it does not seem unfair because it would have been avoided by due diligence."[12]

For these reasons then we hold that the district court's conclusion of law number 5 correctly states the law of Louisiana.

III.
EXPRESS OFFSET PROVISION

Even if it be conceded that conclusion of law number 5 correctly states the nature and extent of the Louisiana lessee's implied obligation to protect against drainage, Humble argues that its implied duty has been superseded by an express offset provision in the lease. The 1933 lease contains the following sentence:

> In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, Lessee agrees to

[12] Hardy, Drainage of Oil and Gas From Adjoining Tracts — A Further Development, note 7, at 58.

> drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances.

Humble now urges that the inclusion in a lease of an express covenant to drill offset wells under specified circumstances preclude the implication of any different or greater obligation with respect to drainage.

After reviewing the principal cases and secondary sources, the district court concluded that the Louisiana courts would not hold that inclusion in the lease of an express requirement to drill offset wells under limited conditions negates any other obligation imposed upon the lessee to protect the leased premises from drainage. 290 F. Supp. at 416. We agree.

At the outset it must be recognized that there are no decisions of the Louisiana courts squarely in point. A review of the decisions of other jurisdictions reveals an increasing reluctance to allow displacement of the implied protection covenant by express offset provisions, especially when the lessee is also the operator whose drilling on adjacent land is causing the drainage.[13]

The experience of the Texas courts is illustrative. *Hutchins v. Humble Oil & Ref. Co.*, Tex. Civ. App. — Galveston, 1942, 161 S.W.2d 571, *writ ref'd n.r.e.*, is probably the authority most often cited for the proposition that an express offset provision bars the implication of any other duty to protect against drainage. The Texas courts themselves, however, have limited that principle so that the express provision controls only during the primary term

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[13] *See* 5 H. Williams & C. Meyers, Oil and Gas Law § 826.3 at 206.2 (1969); Malone, Problems Created by Express Lease Clauses Affecting Implied Covenants, in Second Ann. Rocky Mt. Mineral Law Inst. 133, 148-54 (1956).

of the lease. *See Coats v. Brown*, Tex. Civ. App. — Texarkana, 1957, 301 S.W.2d 932, 936; *Magnolia Petroleum Co. v. Page*, Tex. Civ. App. — San Antonio, 1940, 141 S.W.2d 691, 693, *writ ref'd.* After that the implied protection covenant — applicable to draining wells no matter how far from the boundary line they are located — becomes effective. Moreover, in the recent case of *Shell Oil Co. v. Stansbury*, Tex. 1966, 410 S.W.2d 187, the Texas Supreme Court held that an express offset provision in a lease did not limit the lessee's obligation to protect against drainage when the lessee was also the operator whose drilling on adjacent property was causing the drainage. The court concluded that the lessor was entitled to recover damages — notwithstanding the express offset provision — if he could prove that the lessee had caused substantial drainage and that a reasonably prudent operator would have drilled a well on the lessor's land to protect it from drainage. The court specifically overruled *Hutchins v. Humble Oil & Ref. Co.*, insofar as it conflicts with the principle that "a lessee is under a duty to protect his lessor against depletion of the lessor's minerals by the affirmative act of the lessee upon adjacent land." 410 S.W.2d at 188.

The same result has been reached in the other jurisdictions. In *R.R. Bush Oil Co. v. Beverly-Lincoln Land Co.*, 1945, 69 Cal. App. 2d 246, 158 P.2d 754, a California court refused to allow an express offset provision displace the implied protection covenant when the lessee through its operations on adjoining land was draining the lessor's property. The decision was an outgrowth of the court's view that "there is an implied obligation on the part of an oil and gas lessee to refrain from taking any affirmative course of action which will result in draining a substantial quantity of oil and gas from the lessor's property." 158 P.2d at 758. Thus in the situation where the

lessee drained his lessor's premises by production on adjoining lands, the express offset provisions of the lease could have no application.

The Supreme Court of Mississippi approached the problem in a similar way in *Millette v. Phillips Petroleum Co.*, 1950, 209 Miss. 687, 48 So.2d 344. The court first recognized that the express lease provision limiting the lessee's duty to drill offset wells precluded resort to any other implied obligation with respect to offset wells. 48 So.2d at 346. Nevertheless, the court held that "there is an implied covenant in a lease of oil property that the lessee will do nothing to impair the value of the lease, and must use reasonable care to protect the lessor from damage or loss by the affirmative act of such lessee." *Id.* at 347. That responsibility is entirely separate from the traditional duty to drill offset wells — although it may require in some cases the lessee to drill offset wells. Thus an express lease provision absolving the lessee from any duty to drill offset wells will not necessarily relieve him from liability for substantial drainage caused by his own affirmative act.[14] *Id.*

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[14] Summarizing Millette, one author has said: ". . . In sustaining the recovery of damages by the lessor in the trial court, the majority opinion held:

(1) That the prudent operator rule has no place in a case involving drainage by a common lessee;

(2) That the duty to drill offset wells and the duty to compensate for drainage are entirely separate, and that an express clause affecting the offset well obligation does not necessarily affect the duty to compensate for drainage, and,

(3) That the prudent operator rule applies only to the obligation to compensate for drainage.

In reaching its conclusion the majority also launched a new implied covenant, noted above, which it found to exist under the circumstances. The covenant was variously stated as:

(1) 'The obligation of the lessee not to deplete the resources of the lessor,' and,

(2) 'The obligation to conserve the mineral resources of the

The question then is whether there is any principle in Louisiana jurisprudence similar to the duty expressed in the *Stansbury*, *Bush*, and *Millette* cases that might form the basis for our decision. We believe there is. Article 2710 of the Louisiana Civil Code imposes on a lessee the obligation "[t]o enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease."[15] As Judge Rubin pointed out:

> These words are no hollow invocation. They imply basic obligations of the lessee arising, as the caption of the Code article tells us, "from the nature of the contract" of lease. The original French text used in the Code of 1808 is even more graphic: The lessee is bound to enjoy the thing leased as "bon pere de famille. . . . It is therefore the duty of the lessee, necessarily implied in the lease, to develop the leased premises properly and to prevent drainage of oil and gas from beneath it, not at all hazards and all costs, but "as a good administrator," just as it is the obligation of a lessee enjoying a store under a percentage rental to operate the store with regard to the lessor's interests as well as its own.

Again, as the district court well stated,

> the lessee's duty to act as a good administrator is not a separate and distinct obligation imposed in

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lessor and to refrain from depletory acts.

* * * * *

By way of summary, it may be said that the jealous protection afforded by the courts to the implied covenants to protect against drainage has materially reduced the impact of express clauses upon this covenant. This protection is especially apparent when the drainage results from the activity of a common lessee. In that situation, it appears likely that a remedy will be afforded the aggrieved lessor in some manner, regardless of any express covenant." Malone, Note at 152-53.

[15] Walker, Implied Drilling Obligations in Oil and Gas Leases in Louisiana, 1 Loyola L. Rev. 1, 6-7 (1941); Brown v. Producers Oil Co., 1914, 134 La. 672, 64 So. 674, 677.

> addition to the implied obligations announced by the Louisiana courts: it is the basic obligation of the lessee and all of the implied obligations already drawn are merely elaborations of it.

290 F. Supp. at 414.

Planiol, commenting on the analogous provision in the French Code, Article 1766, says that as a good administrator the lessee

> should maintain the thing as it should be done, and take for its preservation the same precautions that a prudent owner would take for his own. For example, if it is a horse which is leased, the lessee should avoid tiring him, to take it on too long a journey, or make it pull too heavy loads; he should care for and nourish it suitably. If it is cultivated land, he should keep it in good condition; if it is a vineyard, give it the care that vines demand, etc Art. 1766. The lessee should not, therefore, while using the thing according to its destination, make an abusive use of it, such as would compromise its good condition or even its existence.[16]

It is settled in Louisiana that mineral leases are construed as leases generally and that the codal provisions applicable to ordinary leases must be applied to mineral leases whenever they are pertinent. *Melancon v. Texas Co.*, 1956, 230 La. 593, 89 So.2d 135, 142; *Coyle v. North American Oil Consol.*, 1942, 201 La. 99, 9 So.2d 473, 478.

The duty of the Louisiana lessee to use the leased premises as a good administrator must of course encompass an obligation to protect the premises against any im-

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[16] Planiol, Traite de Droit Civil (11th Ed. 1939), T. II, No. 1692 (Trans. La. Law Inst. 1959). Quoted in Rials v. Davis, 1947, 212 La. 161, 31 So.2d 726, a landmark case on the obligations of a Louisiana lessee.

pairment of value threatened by the affirmative act of the lessee himself. An obligation as basic as this one to the protection of the lessor can not be displaced by the insertion in the lease of an express provision relating solely to the establishment of offset wells.

Several factors lead us to this conclusion.

First, lease provisions in derogation of implied obligations are to be strictly construed.[17] Applying that principle to the lease in question, we see that there is only a small area in which the traditional obligations of the lessee are displaced. The lease obligates Humble to drill offset wells whenever production in paying quantities is brought in an adjacent land within 150 feet of plaintiffs' premises, if a reasonably prudent operator would do so under the same or similar circumstances. The district judge correctly observed that the lease "does not expressly negate any obligation on the part of the Lessee to protect The Williams Property from drainage under other circumstances," 290 F. Supp. at 413. Moreover, the lease contains no mention of the possibility of drilling offset completions or seeking unitization or taking any other steps when the lessee himself is causing the drainage. Strictly construed, the lease merely guarantees that in certain circumstances Humble will drill offset wells. When those circumstances are not present, Humble is still obligated to act as a good administrator with respect to the leased premises. It would require a clear and unequivocal clause in a lease to convince the court that the lessor intended to sacrifice that basic obligation owed him by his lessee.[18]

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[17] M. Merrill, Covenants Implied in Oil and Gas Leases § 200 (2d ed. 1940); Merrill, Lease Clauses Affecting Implied Covenants, in Second Ann. Inst. on Oil & Gas Law & Tax. 141, 142-43 (1951).

[18] *See* Walker, Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee, 13 Miss. L. J. 292, 302 (1941).

Second, when the lessee inserts an express offset provision into a lease, he is, of course, attempting to limit the implied responsibility to protect against drainage that he would otherwise have under the law of the jurisdiction.[19] As a general proposition, when the average landowner reads a lease form containing the usual offset provision, it is reasonable for him to assume that the lessee is shouldering an added responsibility. Although there is no objection to enforcing a clause stating clearly that the lessee is not obligated to offset a well more than 150 feet from the boundary line, "to accomplish this through indirection, by appearing to confer a benefit while taking one away, smacks of fraud or unfair dealing."[20] The element of unfairness is most striking in those leases in which the offset distance has been fixed at a figure equal to or even shorter than that permitted by the Conservation Department's spacing rules; those clauses, if enforced, would — because of the impossibility of there ever being a well within that distance — effectively relieve the lessee of all obligation to protect against drainage.[21] Thus because of the indirection of the usual offset provision and the consequent possibility of misinterpreting its legal effect, such clauses should be, at the very least, strictly construed.

Third, we are in agreement with the district court that "the fundamental duties imposed on the parties to a lease by the very nature of their contract must be interpreted in the light of changes in technology and industry practices." 290 F. Supp. at 416. The lease in question was executed in 1933 on Bath's Louisiana Form 12A. The provision obligating the lessee to drill offset wells if draining

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[19] Caldwell, Standard Provisions in Louisiana Mineral Lease Forms and Variations Thereof, 11 La. B. J. 185 (1963); Walker, note 18, at 305.

[20] 5 H. Williams & C. Meyers, Note 13, §826.3 at 206.

[21] *Id.*

wells were brought in on adjacent property within 150 feet was boilerplate; for how many years earlier this form and its offset clause had been in use is unknown. In any event, the offset distance of 150 feet may have represented an honest effort in 1933 to estimate the distance at which drainage usually occurs.[22] If so, that estimate reflected the industry's then existing knowledge of drainage. Improvements in technology, however, have made it abundantly clear that drainage can and regularly does occur at distances far beyond 150 feet. Strict enforcement of lease provisions that were reasonable in light of scientific knowledge and industrial practices in 1933 might be wholly unfair in 1963 or more recent years.

We hold that the offset provision does not displace Humble's implied obligations. Our holding does not change the nature of the mineral lessee's obligation. His obligation remains the same — to protect the leased premises against impairment by drainage. What must change in light of scientific and technological advances are the steps necessary to satisfy that obligation. To measure a lessee's performance of his duties by industry standards long since discarded or upgraded would undermine the continuing duty of the lessee to act as "a good administrator", the "bon pere de famille".

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[22] Bath's Form 42 CPM-New South Louisiana Revised Six (6)-Pooling, currently in favor with South Louisiana operators, sets the offset distance at 330 feet. Caldwell, note 19, at 190-91. Then there is the additional provision 'it being provided however, that lessee shall not be required to drill any offset wells unless the well on adjacent land is within 330 feet of any line of the lands hereunder, nor such shall offset well be necessary when said lands are being reasonably protected by a well on the leased premises or land pooled therewith (all or any part thereof).' An interesting feature of this provision is that at the present time there is no such thing as a well within 330 feet of any line of the leased premises because the Commissioner of Conservation Statewide Order 29-E specifically prohibits drilling wells within 330 feet of any property line. In a situation where the leased premises are suffering substantial net drainage, beyond question, from a robber well located more than 330 feet from the leased premises, it may be wondered whether the courts will hesitate to find that an obligation to offset exists despite this provision of the printed form. *Id.*

IV.

REQUIREMENT OF NOTICE

Humble contends that the plaintiffs' suit is barred as a matter of law because of their failure to comply with the notice provision of the 1933 lease. The last sentence in paragraph 8 of the lease provides,

> And in the event Lessor considers that operations are not being conducted in compliance with this contract, Lessee shall be notified in writing of the facts relied upon as constituting a breach hereof and Lessee shall have sixty (60) days after receipt of such notice to comply with the obligations imposed by virtue of this instrument.

Rejecting Humble's argument, the district court stated in conclusion of law number 4 that "[t]his suit is not barred as a matter of law by the plaintiffs' failure to give notice of breach or notice of default. Whether or not it is barred is a question of fact to be decided by the jury." 290 F. Supp. at 411.

We would go one step further; we conclude that this is a matter to be decided by the court. As a matter of law, we hold that the plaintiffs' cause of action for damages is not barred by their failure to give notice in conformity with paragraph 8 of the lease.

In the law of contracts (conventional obligations) a proper distinction exists between the "interpretation" of written instruments and their "construction".[23] "Interpretation" refers to the process of determining the meaning of the words used; that process is traditionally thought

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[23] *See* 3 A. Corbin, Contracts § 534 (1960); 4 S. Williston, Contracts § 602 (Jaeger ed. 1961); ALI, Restatement (Second), Contracts § 226, Comment c. (Tent. Draft No. 5, Mar. 31, 1970).

to be a function of the jury.[24] On the other hand, the process of determining the legal effect of the words used — once we know their meaning — is properly labelled "construction";[25] it is peculiarly a function of the court."[26] On this point, we agree with Humble that there is nothing in this case for the jury to decide. There is no doubt what words were used — *as well as what words were not used* — and what those words mean. What is left is for the court to assess the legal effect of the words chosen in the light of the nature of the contract.

Notice provisions were originally inserted in mineral leases primarily to protect the lessee against a forfeiture of the lease for breach of some express or implied obligation. Because forfeiture or cancellation is an extraordinary remedy that terminates the lessee's interest it is fair to require that notice, demand, and an opportunity to cure the breach be given the lessee.[27] Thus whenever the lessor has sought cancellation, the Louisiana courts have required strict compliance with the notice requirements of the lease. See, e.g., *Vance v. Hurley*, 1949, 215 La. 805, 41 So.2d 724; *Bollinger v. Republic Petroleum Corp.*, La. App. 1st Cir. 1966, 194 So.2d 139, *writ ref'd*, 250 La. 463, 196 So. 2d 276 (1967); *Fawvor v. U.S. Oil of Louisiana, Inc.*, La. App. 3d Cir. 1964, 162 So.2d 602.

On the other hand, an action for damages threatens no such harsh consequences as termination of the lessee's interest. There is less reason to insist upon notice and de-

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[24] Both Professors Corbin and Williston, however, discern a trend toward the interpretation of written contracts by the court. 3 A. Corbin, Contracts § 554, at 225 (1960); 4 S. Williston, Contracts § 616, at 649 (Jaeger ed. 1961).

[25] 3 A. Corbin, Contracts § 534 (1960).

[26] *Id.* § 554.

[27] *See* 4 H. Williams, Oil and Gas Laws § 682, at 334-35 (1969); M. Merrill, note 17, § 192, at 421.

mand. Indeed, in the ordinary drainage action notice to the lessee would be superfluous. The harm has already been committed, and no action by the lessee to repair the breach could adversely affect the lessor's right to compensation for past harm.[28] In many cases the fact of injury is already known to the lessee, who has superior knowledge of his own operations, long before it becomes known to the lessor. The lessor's inability to give notice of that which he does not know should not in all fairness bar him forever from recovery for damages already incurred.[29] The oil industry was undoubtedly conscious of these considerations when the standard form notice provision in the instant lease was drafted. Therefore, we hold that failure to comply with a notice provision drafted in this language and in these circumstances was not then intended to and does not now bar an action for damages.[30]

We have found no Louisiana decision denying a cause of action for damages for breach of an implied covenant on the ground that the lessor failed to comply with a notice provision in the lease. Both *Bollinger v. Republic Petroleum Corp.*, and *Vance v. Hurley*, relied on by Humble, were actions for cancellation of the lease. Lease provisions of this type are specifically intended to bar actions for cancellation unless the prescribed notice is first given. Since that is the obvious purpose of the clause, it makes sense in that case to enforce its provisions. In the instant

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[28] 4 H. Williams, note 27, § 682, at 335.

[29] M. Merrill, note 17, § 192, at 421.

[30] Our conclusion that the notice provision in the 1933 lease was not intended to bar an action for damages for breach of the implied protection covenant is further strengthened by placing the issue in historical perspective. Recall that in 1933 the mere existence of such a damage action was doubtful. *See* McCoy v. State Line Oil & Gas Co., 1932, 175 La. 231, 143 So. 58; Caddo Oil & Mining Co. v. Producers' Oil Co., 1914, 134 La. 701, 64 So. 684. It is therefore highly unlikely that the notice provision in the 1933 lease was intended to bar an action that, to the best of anyone's knowledge, probably did not even exist in Louisiana.

case notice as a prerequisite to an action for damages makes little sense and could not have been intended by the draftsmen in 1933 when they chose the language of paragraph 8.

We consider that *Billeaud Planters, Inc. v. Union Oil Co. of California*, 5 Cir. 1957, 245 F.2d 14, is inapposite. *Billeaud* was an action for damages for failure to prevent drainage. In that case, however, the lease, drafted in 1944, contains the explicit language, "all [the lessee's] obligations BOTH EXPRESS AND IMPLIED". The notice provision has an additional sentence not contained in the Humble lease: "*The service of said notice* and the lapse of sixty (60) days without Lessee meeting or commencing to meet the alleged breaches *shall be a condition precedent to any action by Lessor for any cause hereunder.*" (Emphasis supplied.) 245 F.2d at 16. The Court took this language as establishing the intent of the parties to require notice as a prerequisite to an action for damages. Moreover, as Judge Rubin pointed out, the *Billeaud* court focused on the failure to drill an offset well, not on the affirmative act of drainage.

The conclusion reached in Billeaud is not compelled by the language of the lease.[31] For example, in *Texas Oil & Gas Corp. v. Vela*, Tex. 1968, 429 S.W.2d 886, the Texas Supreme Court held that a similar clause did not bar an action for damages. Recognizing that the purpose of a notice provision is to protect the lessee against a sudden forfeiture, the court held that the parties "could not have intended that the lessor would be forever barred from recovering damages sustained prior to the giving of notice." 429 S.W.2d at 875. In any event, paragraph 8 of the in-

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[31] For criticisms of the decision of this Court in *Billeaud*, see M. Merrill, note 12, § 200 (1964 Supp.); Note, 18 La. L. Rev. 354 (1958).

stant lease contains no such language. Judge Rubin held that the "difference in language may signify a profound difference in intention [between the Billeaud lease and the Williams lease]"; whether it did in fact was to be resolved by the jury. 290 F. Supp. at 419. We hold, as a matter of law, that the difference in language requires a result different from that reached in the *Billeaud* case.

The district court correctly ruled that if paragraph 8 does not apply to this case, it is still necessary to determine whether notice was nevertheless required under the Louisiana Civil Code The Code distinguishes between "active" and "passive" breaches of a contract. A contract may be breached "either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done."[32] A breach that is passive only requires notice and demand before damages are due,[33] while an active breach does not.[34] Damages for an active breach are due from the moment of the violation. The district court thought it unnecessary at the time to determine whether the classification of a specific breach as active or passive is a question of law or a question of fact. The court did, however, express the opinion that it would be proper to give the issue to the jury, aided of course by appropriate definitions. 290 F. Supp. at 420.

This conclusion we believe to be incorrect. Our reading of the cases convinces us that the Louisiana courts approach the active-passive classification problem as a question for the court. *See, e.g., Melancon v. Texas Co.*, 1956, 230 La. 593, 89 So.2d 135; *Noel Estate, Inc. v. Lou-*

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[32] La. Civil Code art. 1931.
[33] *Id.* art. 1933.
[34] *Id.* art. 1932.

isiana Oil Ref. Corp., 1937, 188 La. 45, 175 So. 744; *Broadhead v. Pan American Petroleum Corp.*, La. App. 3d Cir. 1964, 166 So.2d 329; *Bailey v. Meadows*, La. App. 2d Cir. 1961, 130 So.2d 501. That rule, moreover, would seem to be the better view. The classification of a specific breach as active or passive requires a construction of the bare words of the Code in the light of the gloss of past decisions. Defining the terms "active" and "passive" for a jury in accord with the simple language of Article 1931 of the Louisiana Civil Code consistent with the complicated decisions on the subject would tax the jury with drawing a bright dividing line where none exists in the jurisprudence.[35] The chances of arbitrary decision making will be substantially lessened if the court, guided by the Code, decisions, and commentaries, should decide whether a specific breach is to be characterized as active or passive.

Applying that principle to the instant case, we conclude that the specific violation alleged is an active breach and therefore that the plaintiffs were not required to give notice as a condition to their action for damages. Generally the failure to perform an obligation in an oil and gas lease is a passive breach, which requires notice and a formal demand. *See Savoy v. Tidewater Oil Co.*, W.D. La. 1963, 218 F. Supp. 607, *aff'd* 5 Cir. 1964, 326 F.2d 757; *Bonsall v. Humble Oil & Ref. Co.*, W.D. La. 1961, 201 F. Supp. 516, 521, *aff'd* 5 Cir. 1962, 300 F.2d 150; *Touchet v. Humble Oil & Ref. Co.*, W.D. La. 1960, 191 F. Supp. 291, 294; *Broadhead v. Pan American Petroleum Corp.*, La. App. 3d Cir. 1964, 166 So.2d 329, 332. In several cases involving the nonpayment of royalties, however, the Louisiana courts have held that an unreasonable and unjustifiable delay in paying royalties constituted an active rather

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[35] *Cf.* Smith, The Cloudy Concept of Default, in Twelfth Ann. Inst. on Mineral Law 3 (1965).

than passive breach. *Bollinger v. Texas Co.*, 1957, 232 La. 637, 95 So.2d 132; *Melancon v. Texas Co.*, 1956, 230 La. 593, 89 So.2d 135; *Pierce v. Atlantic Ref. Co.*, La. App. 3d Cir. 1962, 140 So.2d 19; *Bailey v. Meadows*, La. App. 2d Cir. 1961, 130 So.2d 501. Thus, in some cases at least, a willful failure to perform may amount to action inconsistent with the contract.

The Louisiana courts have not as yet had an opportunity to classify a breach of the lessee's implied obligation to prevent drainage. In *Breaux* the question of notice did not arise. In his dissenting opinion, Judge Tate assumed that such a breach was passive, as are failure to act generally. Nevertheless, he acknowledged the possibility that the breach may have been active because the lessee himself was doing the draining through wells drilled on the adjacent premises. 163 So.2d at 421. Professor Hardy has also made the suggestion that when drainage is caused by the operations of the lessee on adjoining property, notice is unnecessary.[36] In that situation the lessee has not merely failed to perform his duty to protect against drainage; he has also knowingly and affirmatively acted in a manner inconsistent with that obligation. The action of the common lessee in this regard is analogous to the wilful conduct that characterized the nonpayment of royalty cases. Just as in *Bollinger*, *Melancon*, *Pierce*, and *Bailey*, the lessee's action here should be viewed as an active breach of his lease obligations.

In *Billeaud Planters, Inc. v. Union Oil Co. of California*, this Court characterized the lessee's failure to prevent the drainage that he was also causing as "only a pas-

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[36] Hardy, The Work of the Louisiana Appellate Courts for the 1963-1964 Term, note 10, at 365; Note, 18 La. L. Rev. 354, 359-60 (1958).

sive breach of contract." 245 F.2d at 18. The statement was purest dictum, however, inasmuch as the lessor's cause of action was held to be barred by his failure to comply with an express notice provision in the lease. In addition, the Court cited only a 1910 construction contract case[37] as authority for its conclusion.

We conclude that the Louisiana courts would find the analogy of the *Bollinger*, *Melancon*, *Pierce*, and *Bailey* cases persuasive and hold that the lessor's action for damages is not in the circumstances of this case barred by his failure to give notice to his lessee. Necessarily, we also conclude that the Louisiana courts would characterize as "active" the lessee's failure to prevent the drainage that he is in fact causing by his own operations on adjoining property.[38]

AFFIRMED as to the result reached by the district court and REMANDED for further proceedings consistent with this opinion.

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[37] Godchaux v. Hyde, 1910, 126 La. 187, 52 So. 269.

[38] ". . . On the other hand, it would appear that the lessee is bound, as in any contract, not to do anything inconsistent with its obligations to do. Where the lessee has omitted to accomplish its positive obligations, while wilfully draining from a productive sand underlying the leased tract, he is in a rather poor position to contend that the only fault on his part is passive omission to act. Thus, it is certainly not illogical to assert that the default of obligations to do, coupled with the knowing depletion of sands beneath the leased tract, is an active breach of the lease contract. . . . However, where production from the adjoining lands is fully within control of the lessee, it would appear that drainage from the undeveloped tract is not merely an omission but action inconsistent with the express and implied obligations to develop the leased tract. It can hardly be denied that in this instance the lessee was aware that it was depleting the reserves underlying the leased tract. Protection from liability could have been achieved by compliance with the obligations of the lease contract. It seems inconsistent with civilian ideas of fault as a basis of recovery to state that the lessee was in need of notice of its transgression." Hardy, Note, 19 La. L. Rev. 354, 359-60.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26968

FLOYD WILLIAMS, FREDERICK C. WILLIAMS, ET AL,
Plaintiffs-Cross Appellees,

I. R. PRICE, EDWARD H. TAUSSIG and EDWIN F. GAYLE,
Plaintiffs-Appellants-Cross Appellees,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(December 8, 1970)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

WISDOM, Circuit Judge: The Court has considered all of the issues raised in Humble's Petition for Rehearing and Suggestions of Rehearing en Banc and the brief of the *amici curiae* in support of the petition for rehearing.

Humble and *amici curiae* argue strenuously that this Court erred in holding that "the Louisiana courts would characterize as 'active' the lessee's failure to prevent the drainage that he is in fact causing by his own operations on adjoining property." *See Williams v. Humble Oil & Refining Co.*, 5 Cir. 1970, 431 F.2d ..... We agree with the petitioners that under Louisiana law the breach of an implied obligation in an oil and gas lease is generally a passive breach, which requires notice and a formal demand. But we cannot agree that the alleged breach in the circumstances of this case was merely passive.

We have found no case in which the Louisiana courts have classified a lessee's failure to prevent the drainage that he is in fact causing by his own operations on adjoining property. In *Breaux v. Pan American Petroleum Corp.*, La. App. 3 Cir. 1964, 163 So.2d 406, the question of notice did not arise, inasmuch as the plaintiffs made a formal demand before filing suit. *Id.* at 408. Nevertheless, the petitioners now argue that *Breaux* holds that the alleged breach in a factual situation of this kind is only passive. Specifically, they point to the court's statement in Breaux "that plaintiffs in this suit have no greater rights and no different cause of action against defendants-lessees simply because the defendants are also the lessees of the adjoining tract of land on which the alleged draining well is located." *Id.* at 417. We do not dispute this statement, but we cannot agree that the language is controlling on the issue of notice.

In *Breaux* the plaintiffs argued that when the defendant occupies the dual position of being lessee of the plaintiffs' property and also lessee of the adjoining tract on which the draining well is located, the plaintiff lessor is then entitled to one-half the royalties due on production

from the draining well. In the words of Judge Hood, "The question presented, therefore, is *whether a different measure of damages* should be used where plaintiff's lessee is also the operator of the draining well." *Id.* at 416. The language to which petitioners refer is the court's answer to that question. By that language the court was simply reaffirming its holding that even in a factual situation of this kind, to recover damages the lessor must prove (1) that substantial drainage has occurred, (2) that it would have been economically feasible for the lessee to take steps to prevent the drainage, and (3) the amount of royalties that the lessor would have received had the lessee taken the appropriate steps. In other words, the plaintiffs in this case have no greater rights or different cause of action than do the plaintiffs in an ordinary drainage action. But the court's views on the requisite proof of drainage and the proper measure of damages cannot be treated as controlling on the question of notice, especially when that question was not even presented to the court.

As pointed out in our original opinion, in *Billeaud Planters, Inc. v. Union Oil Co. of California*, 5 Cir. 1957, 245 F.2d 14, the Court characterized the lessee's failure to prevent the drainage that he was also causing as "only a passive breach of contract." *Id.* at 18. We did not follow *Billeaud*, however, as the characterization there seemed both unnecessary to the result in the case and also based on scant authority. The petitioners now argue that the classification of the breach was essential to the decision and cite additional authorities to support the finding of a passive breach.

We still do not consider ourselves bound by that statement in *Billeaud*. Since the Court's decision in *Billeaud* a line of cases has developed in which the Louisiana courts

have indicated that in some instances at least, a willful failure to perform an obligation may amount to action inconsistent with the contract, i.e., an active breach of the contract. *See Bollinger v. Texas Co.*, 1957, 232 La. 637, 95 So.2d 135; *Melancon v. Texas Co.*, 1956, 230 La. 593, 89 So.2d 135; *Fontenot v. Sunray Mid-Continent Oil Co.*, La. App. 3d Cir. 1967, 197 So.2d 715; *Sellers v. Continental Oil Co.*, La. App. 3d Cir. 1964 168 So.2d 435; *Pierce v. Atlantic Ref. Co.*, La. App. 3d Cir. 1962, 140 So.2d 19; *Bailey v. Meadows*, La. App. 2d Cir. 1961, 130 So.2d 501; *cf. Jones v. Whittington*, La. App. 2d Cir. 1965, 171 So. 2d 764. In addition to the analogy to this growing number of cases on the nonpayment of royalty, the *Billeaud* Court lacked the advantage of Professor Hardy's cogent analysis of civilian concepts of fault. In his words,

> The act of draining two leases by means of one well is not merely a passive failure to comply with an obligation to protect the drained lease, it is conduct clearly inconsistent with that obligation if it occurs in the face of actual or constructive knowledge of the drainage. Thus, the lessee's action should properly be viewed as an active breach of his lease contract.

Hardy, The Work of the Louisiana Appellate Courts for the 1963-64 Term — Mineral Rights, 25 La. L. Rev. 360, 365-66 (1965). *See also* Note, 18 La. L. Rev. 354 (1958).

For these reasons as well as those expressed in our original opinion, we adhere to our conclusion that the Louisiana courts would characterize as "active" the breach of the lessee's obligation to protect against drainage that the plaintiffs allege occurred in this case. If the plaintiffs can prove their allegations, they are entitled to damages despite their failure to give notice before commencing this lawsuit.

The Petition for Rehearing on behalf of Humble Oil is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 26968

D. C. Docket No. CA 14312

FLOYD WILLIAMS, FREDERICK C. WILLIAMS, ET AL,
Plaintiffs-Cross Appellees,

I. R. PRICE, EDWARD H. TAUSSIG and EDWIN F. GAYLE,
Plaintiffs-Appellants-Cross Appellees,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant-Appellee-Cross-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that plaintiffs-cross appellees and plaintiffs-appellants-cross appellees be condemned to pay one-third the costs on appeal to be taxed by the Clerk of this Court and that defendant-appellee-cross-appellant be condemned to pay two-thirds of said costs.

September 30, 1970

Issued As Mandate: Dec. 16 1970

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT.

Filed Aug. 28, 1968.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 14,312, Division "C".

FLOYD WILLIAMS, ET AL.,
Plaintiffs,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant.

This cause came on to be heard on motion of defendant for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the matter and having heard oral argument; having found that there is no genuine issue of material facts as to plaintiffs' first cause of action, and having concluded that defendant is entitled to judgment as a matter of law as to such cause of action; and having further found that defendant is not entitled to judgment as a matter of law as to plaintiffs' remaining causes of action; having found that there is no just reason for delay in entering this judgment, and that an immediate appeal from this judgment may materially advance the ultimate termination of the litigation,

It is Ordered, Adjudged and Decreed:

(1) That summary judgment be granted in favor of defendant dismissing plaintiffs' first cause of action;

(2) That summary judgment be denied on the issues of notice as a pre-requisite to the action, of compliance with the express offset provision of the lease, and of compliance with the implied obligation to offset;

(3) That this judgment involves controlling questions of law, both as to the issue on which the motion is granted and the issues as to which the motion is denied as to each of which there is a substantial ground for difference of opinion, and that an immediate appeal from this judgment, both as to that portion of the motion granted and those portions of the motion denied, may materially advance the ultimate termination of this litigation.

ALVIN B. RUBIN,
United States District Judge.

August 28th, 1968.

FINDINGS ON MOTION FOR SUMMARY JUDGMENT.

Filed Aug. 28, 1968.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 14,312, Division "C".

FLOYD WILLIAMS, ET AL.,
Plaintiffs,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant.

Rubin, District Judge:

For reasons set forth in the attached memorandum opinion, the motion for summary judgment is Granted in part and Denied in part. However, in accordance with the provisions of Rule 56(d) of the Federal Rules of Civil Procedure, the Court has examined the pleadings and the evidence before it and has interrogated counsel to ascertain what material facts without substantial controversy and what material facts are actually and in good faith controverted. The following facts appear to be without material controversy, and upon trial of this action, they will be deemed established:

1. Humble Oil & Refining Company ("Humble") is the present lessee under the mineral lease originally granted to I. R. Price, as lessee, a copy of which is annexed to the plaintiffs' complaint ("The Lease").

2. In 1933, the Federal Land Bank of New Orleans

granted The Lease to I. R. Price, one of the plaintiffs in this suit. Price was a lease broker and was acting as agent for Humble. The property affected by The Lease is referred to as The Williams Property.

3. The Lease was on a printed form and contained provisions then in common use.

4. The Federal Land Bank was a large landowner, and employed experienced persons to look after its mineral interests. In addition, it had available the advice of a lawyer regularly employed by it.

5. Humble paid Price 2 years rentals in advance and, by the use of this prepayment, Price succeeded in getting the Land Bank to sell The Williams Property to the Williams family, from whom it had acquired the property.

6. The Land Bank reserved a quarter interest in the minerals.

7. Price assigned The Lease to Humble.

8. The Williams family granted Price and another Plaintiff, Edwin F. Gayle, a mineral interest in The Williams Property for their services.

9. Humble drilled a well on The Williams Property in 1937. This was the discovery well in the North Crowley field, and it is known as Williams No. 1.

10. Humble drilled additional wells on The Williams Property in a surface spacing pattern containing approximately 20 acres per well.

11. Production of oil and gas from The Williams

Property or from premises pooled with them is still continuing.

12. The plaintiffs and others who share in the royalties payable under The Lease have received payments from the date of first production to March 1, 1964, of more than $1,274,000.

13. As of March 1, 1964, Humble had drilled 20 wells on The Williams Property at a cost of more than $2,750,000.

14. The plaintiffs' claims in this suit relate only to sands located above the Frio ("The Shallow Sands").

15. In 1963, Humble applied to the State Conservation Department for units affecting The Shallow Sands and unitization orders were issued pooling The Williams Property with other lands as to certain reservoirs in The Shallow Sands effective April 1, 1964.

16. As of March 1, 1964, Humble had performed at least 46 workover operations on wells on The Williams Property producing from The Shallow Sands; these cost more than $1,000,000.

17. There are two unit wells or units in which portions of The Williams Property are pooled situated on adjoining premises within 150 feet of the leased premises. There is no other well on adjoining premises situated within 150 feet of the leased premises.

18. The plaintiffs do not contend that Humble should have drilled an additional well or wells on The Williams Property in order to prevent drainage of oil and gas from beneath the surface of these premises by wells drilled by Humble on adjacent properties. However, the plaintiffs contend that, if Humble had completed an existing well

or wells on The Williams Property to another sand or sands in addition to the one from which that well was already completed, in order to prevent drainage of oil and gas from beneath the surface of The Williams Property by wells drilled by Humble on adjacent properties, Humble could have expected to receive a reasonable profit above the additional cost of effecting the additional completion.

The following conclusions of law have been reached by the Court and shall be applied in the conduct of the trial:

1. In order for the plaintiffs to recover damages from the defendant because of a breach of the defendant's implied obligation as lessee to exercise reasonable diligence to prevent drainage of minerals from beneath the surface of the leased premises, the plaintiffs must establish by a preponderance of the evidence that oil or gas could have been produced from the same reservoirs as those from which production was actually obtained through wells drilled on other property, that this could have been accomplished by additional or offset completions effected from wells already drilled on the leased premises, and that it would have been economically feasible for the lessee to effect such additional completions.

2. The burden of proof is on the plaintiffs to establish the damages sustained by them by showing by a preponderance of the evidence the quantity of oil and gas that would have been produced from the offset completions and the value of the minerals that plaintiffs would have received from that production had the offset completions been timely effected.

3. If the plaintiffs have a claim, it is only for damages, and the plaintiffs are not entitled to an accounting. Therefore, summary judgment should be granted in favor

of the defendant on the plaintiffs' first cause of action.

4. This suit is not barred as a matter of law by the plaintiffs' failure to give notice of breach or notice of default. Whether or not it is barred is a question of fact to be decided by the jury.

5. A mineral lessee has a duty to the mineral lessor to act as a prudent administrator of the leased premises. If the lessee is draining oil or gas from beneath the leased premises by a well drilled by the lessee on other property, its duty to act as a prudent administrator may include an implied obligation to unitize the leased premises with those from which production is being obtained, or to drill an offset well, or to effect an offset completion of a well already drilled on the leased premises, if these acts are economically feasible (under the principles set forth in paragraph 1, above) or to do those other things, if any, that a prudent administrator would do under the circumstances. What action a prudent administrator would take under the circumstances is a factual question to be decided by the finder of fact in the light of the relevant evidence.

These conclusions of law are more fully set forth in the attached opinion and are reached for the reasons and under the authorities set forth therein.

There being no just reason for delay, summary judgment is Granted in favor of the defendant on the plaintiffs' first cause of action. The defendant's motion for summary judgment on the issue of notice as a prerequisite to this action is Denied.

ALVIN B. RUBIN,
United States District Judge.

New Orleans, Louisiana.
August 27, 1968.

REASONS FOR SUMMARY JUDGMENT.

Filed Aug. 28, 1968.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 14,312, Division "C".

FLOYD WILLIAMS, ET AL.,
Plaintiffs,

versus

HUMBLE OIL & REFINING COMPANY,
Defendant.

Rubin, District Judge:

The plaintiffs seek an accounting and, in the alternative, damages, for breach of Humble's implied obligation as a mineral lessee to exercise reasonable diligence to prevent the drainage of oil and gas from beneath their property. The principles to be applied in this diversity suit are determined by the law of Louisiana. Williams' prospects of recovery in federal Court, like Tompkins', are the same as those he would have in state Court. Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188.

I. Accounting.

The plaintiffs' first cause of action alleges that the plaintiffs wrote a letter on March 29, 1963, demanding payment of $1,226.00 for oil drained from The Williams Property by wells drilled by Humble on adjacent property, and that Humble replied denying "substantial drainage." The plaintiffs conclude that this admits that some drainage occurred and that they thereby became entitled to an

accounting. But even if the plaintiffs' premises are correct, their conclusion is a non sequitur. Even if liability is established because Humble's letter is read as admitting "insubstantial drainage," the plaintiffs' claim, under Louisiana law, is one for damages. They have no right to an accounting.

By judicial improvisation, relying largely upon the analogy to principles of lease and servitude, Louisiana's Courts have evolved a body of rules applicable to an industry unknown when the Civil Code was adopted. The shaping of the basic precepts began almost 50 years ago. In 1922 Louisiana's Supreme Court held that a landowner does not own the oil and gas beneath his property. Frost-Johnson Lumber Co. v. Salling's Heirs, 1922, 150 La. 756, 91 So. 207. He has the exclusive right to search for minerals and to reduce them to his possession. But only upon taking possession does he become vested with ownership.[1] This rule has since been consistently applied. Although it has been indicated that a wilful or negligent interference with the landowner's right to attempt to reduce minerals to his possession might create a cause of action,[2] the rule that minerals do not belong to the owner of the surface until he reduces them to his possession has never been qualified.[3] The supposed fugacious quality of oil and gas has led the Louisiana Courts to conclude that the owner of a tract of land cannot claim the oil or gas produced by a neighbor as a result of drainage from his property.[4]

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[1] Frost-Johnson Lumber Co. v. Salling's Heirs, 1922, 150 La. 756, 91 So. 207; Liles v. Texas Co., 1928, 166 La. 293, 117 So. 229; Wright v. Imperial Oil & Gas Products Co., 1933, 177 La. 482, 148 So. 685.

[2] McCoy v. Arkansas Natural Gas Co., 1932, 175 La. 487, 143 So. 382.

[3] Adams v. Grigsby, La.App., 1963, 152 So.2d 619; Whitehall Oil Co. v. Heard, La.App., 1967, 197 So.2d 672.

[4] Higgins Oil & Fuel Co. v. Guaranty Oil Co., 1919, 145 La. 233, 82 So. 206; Louisiana Gas & Fuel Co. v. White Bros., 1925, 157 La. 728, 103 So. 23; Breaux v. Pan American Petroleum Corp., La.App., 1964, 163 So.2d 406.

Enactment of the conservation law has not changed his "rule of capture."[5]

The principles fixed by the Louisiana jurisprudence were summed up by the Louisiana Court of Appeal for the Third Circuit in Breaux v. Pan American Petroleum Corp., La. App. 1964, 163 So.2d 406, as follows:

> "It is well settled in Louisiana that oil and gas in place are fugitive minerals which are not subject to absolute ownership as specific things apart from the soil. The owner of land does not own the fugitive oil or gas beneath it so as to have the right to follow it after it has left his land, but he does have the right to drill on his land and to become the owner of such oil and gas as he may thereby draw through the soil and bring into his possession." 163 So.2d at 409.

Breaux squarely holds that the right of the landowner-lessor against his lessee in the event of a breach of the lessee's implied obligation to exercise reasonable diligence to prevent drainage is a right to recover damages. A creditor, as such, has no right to an accounting in Louisiana. Where Louisiana Courts have recognized an action for an accounting, they have done so under the provisions of Louisiana Civil Code Article 21, which provides:

> "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

The plaintiffs claim that Humble violated an implied

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[5]The Louisiana cases that have dealt with the problem of drainage since the adoption of the existing conservation statute have continued to follow the "rule of capture." See, e.g., Breaux v. Pan American Petroleum Corp., La.App., 1964, 163 So.2d 406; Whitehall Oil Co. v. Heard, La.App., 1967, 197 So.2d 672.

term of its contract with them. The Breaux case makes it clear that they can recover only such damages as they can prove. They are not entitled to an accounting.[6] Therefore, the motion for a summary judgment as to the first cause of action will be Granted.

II. Express Obligation to Drill Offset Wells.

Humble urges it does not owe the plaintiffs an implied obligation to effect additional completions of existing wells because The Lease contains an express provision relating to offset wells, reading as follows:

> "In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, Lessee agrees to drill such offset wells as a reasonable prudent operator would drill under the same or similar circumstances."

Humble contends that this supersedes any implied obligation. Other than two unit wells, the units of which include portions of The Williams Property, no well has been brought in on adjacent land within 150 feet of the leased premises. Hence, Humble urges that, since the contract is the law between the parties,[7] the inclusion of this express obligation to drill offset wells under some cirstances precludes the application of a different or more extensive obligation.[8]

The Lease clearly obliges Humble to drill offset wells under some circumstances; it does not expressly negate

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[6] That plaintiffs themselves seek a jury trial is not controlling, but a suit for an accounting is not one cognizable by a jury at common law under the principles recognized in the Seventh Amendment.

[7] Art. 1901, LSA-C.C.; Billeaud Planters, Inc. v. Union Oil Co. of California, 5 Cir., 1957, 245 F.2d 14.

[8] Foster v. Atlantic Refining Co., 5 Cir., 1964, 329 F.2d 485 (Texas).

any obligation on the part of the Lessee to protect The Williams Property from drainage under other circumstances. It does not deal with the question of the lessee's obligation to protect the leased premises from drainage by wells on property that may not be adjacent, or with whether the lessee has an obligation to prevent drainage by means other than drilling offset wells, for example, by dual completion of existing wells or unitization proceedings, or with any duty that may be imposed on the lessee when the lessee itself is causing the drainage.[9]

Courts in other states have held that even though a mineral lease contains an express provision dealing with a subject, an obligation that would otherwise be legally implied as part of the contract will be enforced to the extent that the express and the implied obligation are not inconsistent.[10]

In Louisiana, the mineral lease has been interpreted in the light of the provisions of the Louisiana Civil Code relating to predial leases.[11] It is not to be read within its four corners: it contains implied obligations on the part of both lessee and lessor.[12] The mineral lessee, like other lessees, undertakes the obligation imposed by Louisiana Civil Code Article 2710 "To enjoy the thing leased as a

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[9] Phillips Petroleum Co. v. Millette, 221 Miss. 1, 1954, 72 So.2d 176.

[10] Hartman Ranch Co. v. Associated Oil Co., Calif., 1937, 73 P.2d 1163; Stanolind Oil & Gas Co. v. Christian, Texas, 1935, 83 S.W. 2d 408. See also, Merrill, Implied Covenants in Oil and Gas Leases, (2d ed. 1940) § 6 at 27; Note, 1967, Remedies for Breach of Implied Covenants in Oil and Gas Leases in Montana, 28 Mont.L.Rev. 187.

[11] "The rule is equally well established that in construing mineral leases, '. . . the codal provisions applicable to ordinary leases must be applied.' " Melancon v. Texas Co., 1956, 230 La. 593-....., 89 So.2d 135, 142. Coyle v. North American Oil Consolidated, 1942, 201 La. 99, 9 So.2d 473; Tyson v. Surf Oil Co., 1940, 195 La. 248, 196 So. 336.

[12] Pipes v. Payne, 1924, 156 La. 791, 101 So. 144; Reagan v. Murphy, 1958, 235 La. 529, 105 So.2d 210; Breaux v. Pan American Petroleum Corp., La.App., 1964, 163 So.2d 406, cert. denied, 246 La. 581, 165 So.2d 481.

good administrator, according to the use for which it was intended by the lease."[13]

These words are no hollow invocation. They imply basic obligations of the lessee arising, as the caption to the Code article tells us, "from the nature of the contract" of lease. The original French text used in the Codes of 1808 and 1825 is even more graphic: the lessee is bound to enjoy the thing leased as "bon pere de famille. . . ."

The Louisiana Courts have found that certain obligations are implied from the mineral lease.[14] They have not, however, clearly indicated the conceptual basis for imposing those obligations but have apparently reached this conclusion, at least in part, because of the influence of decisions in common law states. Civilian doctrine would draw all of these implied obligations from the basic duty to enjoy the thing leased as a good administrator.[15]

Viewed in this light, the lessee's duty to act as a good administrator is not a separate and distinct obligation imposed in addition to the implied obligations announced by the Louisiana Courts: it is the basic obligation of the lessee and all of the implied obligations already drawn are merely elaborations or reflections of it.

Planiol, a French commentator to whom Louisiana Courts have frequently turned for interpretation of the Civil Code articles derived from French sources, says the lessee is required to use the thing leased in the same manner as a prudent owner would use his own property. In describing the obligation he says:

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[13] Simmons v. Pure Oil Co., 1961, 241 La. 592, 129 So.2d 786.

[14] See, e.g., Coyle v. North American Oil Consolidated, 1942, 201 La. 99, 9 So.2d 473, finding an implied obligation to drill offset wells.

[15] See Walker, "Implied Drilling Obligations in Oil and Gas Leases in Louisiana," 1 Loyola L.Rev. 1 (1941).

> "For example, if it is a horse which is leased, the lessee should avoid tiring him, to take it on too long a journey or make it pull too heavy loads; he should care for and nourish it suitably. If it is cultivated land, he should keep it in good condition; if it is a vineyard, give it the care that vines demand, etc. See Art. 1766. The lessee should not, therefore, while using the thing according to its destination, make an abusive use of it, such as would compromise its good condition or even its existence."

The fundamental purpose of the mineral lease—"the use for which it was intended by the lease"—is the production of minerals.[16] Once production commences, the lessor is paid rent[17] for the leased premises only by the royalty reserved in the lease. It is therefore the duty of the lessee, necessarily implied in the lease, to develop the leased premises properly and to prevent drainage of oil and gas from beneath it, not at all hazards and all costs, but "as a good administrator,"[18] just as it is the obligation of a lessee enjoying a store under a percentage rental to operate the store with regard to the lessor's interests as well as its own.[19]

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[16] McDonald v. Grande Corp., La.App., 1962, 148 So.2d 441.

[17] Louisiana Courts have often characterized the lessor's royalty as rent. See, e.g., Roberson v. Pioneer Gas Co., 1931, 173 La. 313, 137 So. 46; Robinson v. Horton, 1941, 197 La. 919, 2 So.2d 647; Davis v. Laster, 1962, 242 La. 735, 138 So.2d 558.

[18] In connection with the powers granted the lessee by a pooling clause, the Louisiana Court of Appeal for the Third Circuit said, in McDonald v. Grande Corp., La.App., 1962, 148 So.2d 441, 449, "As indicated by the cited cases, the jurisprudence in Louisiana and in other states interprets the powers granted the lessee by a voluntary pooling clause as subject to such restrictions as will prevent arbitrary and unfair dealings and as will therefore enforce a 'standard of good faith' on the part of the mineral lessee."

[19] Selber Bros. v. Newstadt's Shoe Stores, 1943, 203 La. 316, 14 So.2d 10. See also The Work of the Louisiana Appellate Courts for the 1962-63 Term, Mineral Rights, 24 La.L.Rev. 215, 218 (1964); The Work of the Louisiana Appellate Courts for the 1961-62 Term, Mineral Rights 23 La.L.Rev. 323, 336 n. 40, 338 (1963) in which reference is made to "increasing utilization of what might be termed a fiduciary principle in oil and gas law."

These basic concepts guide Louisiana Courts in reading the entire lease, as well as in determining what additional obligations are implied in it. No Louisiana cases appear to have considered whether an express clause that imposes certain specific obligations relative to offset wells supersedes any other obligation to protect the leased premises from drainage on the part of the lessee. In Wilkins v. Nelson, 1926, 161 La. 437, 108 So. 875, the Court sustained an exception of no cause of action to a petition to cancel a lease for failure to protect the premises from drainage on the basis that no violation of an express covenant similar to the one involved here was shown, but the Court did not discuss whether there was an implied obligation that went further than the express clause. However, it did hint at recognition of an additional implied obligation for it said that the petition did not allege "that defendant has acquired the lands adjacent to his lease, and within [the limits fixed by the lease that would require the lessee to drill] in an effort to defeat his obligation to develop the property for oil, in the event an oil well should be drilled within that distance from the property leased." 108 So. at 876. Nor does Hart v. Standard Oil Co., 1920, 146 La. 885, 84 So. 169, militate against the existence of an implied obligation where the lease contains an express obligation to drill offsets within a prescribed distance (there, "as is customary in the Caddo field"), for the Court observed in Hart, "The testimony of men of experience in the business shows that the well could not have drained plaintiff's land, and therefore did not call for an offset well," and added, "There is ample proof, too, that the custom in the Caddo oil field did not demand that a well of that capacity and at that distance should have been offset."[20]

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[20] 84 So. at 170.

The jurisprudence of other states points up the reluctance with which Courts will hold that the express covenant to drill certain offset wells negates the implied covenant to protect the leased premises from drainage. In some cases, Courts have held that the express obligation applies only until the first well is drilled on the leased premises or until the end of the primary term and have applied the implied covenant thereafter.[21] In Millette v. Phillips Petroleum Co., 1950, 209 Miss. 687, 48 So.2d 344, although the Court said that the express offset provision precluded equitable relief so far as an implied duty to drill offset wells was concerned, the Court held that the lessee's "equitable duty, existing as well under implication, to conserve the mineral resources of lessors or to refrain from depletory acts survives unimpaired." 48 So.2d at 347.

The effect of an express offset covenant on the implied duty to protect from drainage is fully considered by Professor Charles J. Meyers of the Stanford University Law School in "The Effect of Express Provisions in an Oil and Gas Lease on Implied Obligations," Fourteenth Annual Mineral Law Institute 90, 107 (1967). He states:

> "I think the Courts that are troubled by the express offset covenant are justified in their concern. While the logic of the express clause is inescapable, many landowners have something less than perfect command of logic. If you know nothing at all about implied covenants, even a careful reading of a lease form containing an express offset clause would

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[21] Chapman v. Sohio Petroleum Co., Tex.Civ.App., 1956, 297 S.W. 2d 885; Coats v. Brown, Tex.Civ.App., 1957, 301 S.W.2d 932; Magnolia Petroleum Co. v. Page, Tex.Civ.App., 1940, 141 S.W.2d 691. But see Hutchins v. Humble Oil & Refining Co., Tex.Civ.App., 1942, 161 S.W.2d 571, the express offset provision was held to be the sole obligation of the lessee concerning the protection of the leased premises from drainage. This case has been severely criticized by commentators. See, e.g., Merrill, Implied Covenants in Oil and Gas Leases, § 6, n. 11; Meyers, The Effect of Express Provisions in an Oil and Gas lease on Implied Obligations, Fourteenth Annual Mineral Law Institute 90 (1967).

> suggest that the lessee is assuming an affirmative, extra undertaking; when in fact he is shucking off responsibility that he would otherwise have. I am therefore inclined to think that Courts ought not to treat the express covenant as negating the implied covenant.
>
> "When the offset distance is fixed at a figure shorter than that permitted by the spacing rules I am even more certain that the express clause should not be given pre-emptive effect. * * * Thus if the lease states that no protective wells will be drilled to offset draining wells beyond 650 feet or that no protection wells will ever be drilled on said leasehold, the Courts should enforce the provision to the fullest. But Courts should not enforce clauses having the effect of the foregoing but suggesting to the innocent just the opossite. The Courts should be unmasking the wolf, not helping him keep his sheep's clothing neatly in place." Id. at p. 110.

Guided by the usual principles that determine a lessor's duty, the Louisiana Courts, I think, would not hold that inclusion of the limited express requirement of drilling offset wells contained in The Lease negates any other obligation by the lessee to protect the leased premises from drainage. Humble suggests that, while this express covenant "might be thought to be severe," it was customary when the lease was prepared, the lease price was fair, and it was only 30 years later that a breach was alleged. This arguments fails to take adequately into account the fundamental nature of the contract of the lease: taken at face value it would negate almost every implied obligation.

It does not devitalize the lease to say that the fundamental duties imposed on the parties to a lease by the very nature of their contract must be interpreted in the light of changes in technology and industry practices. What

was diligent development in 1933, when wells were customarily drilled to a relatively shallow depth is obviously not diligent development in 1967 when many wells are successfully drilled at depths in excess of 15,000 feet. It does not alter the contract to hold, as I think the Courts of Louisiana would, that the lessee's implied obligations are to be interpreted in the light of the technological methods that are now economically feasible, not in the light of industrial practices 35 years ago.

III. The Nature and Extent of the Lessee's Implied Obligation.

It must be assumed, then, that the lessee does have an implied obligation to protect The Williams Property from drainage and that this obligation is not limited to drilling offsets to wells within 150 feet of the leased premises. But Humble urges that, if there is such a duty, the mineral lessee's implied duty to its lessor with respect to avoiding drainage is no different whether the drainage is caused by a third party or by the lessee itself. In either event the duty, it argues, is merely to drill offset wells under the same circumstances that would require any prudent operator of the leased premises to drill such wells. On the other hand, the plaintiffs argue that the lessee's implied duty to protect the lessor's premises from drainage includes an obligation to reimburse the lessor for drainage occasioned by the lessee even when the lessee could not have profitably brought in production on the leased premises.[22]

A number of Courts in other states have considered this problem, but there is no agreement on its solution. Professor George W. Hardy, III, Professor of Mineral

[22] Phillips Petroleum Co. v. Millette, 221 Miss. 1, 1954, 72 So.2d 176.

Law at the Louisiana State University Law School, has written:[23]

> "Some cases have apparently considered of little or no significance the fact that the lessee of the complaining lessor is causing the drainage.[24] Others have categorically denied that there is any significance attaching to this fact.[25] Still others have suggested the existence of a higher duty on the part of the lessee causing drainage by wells on adjoining land.[26] In seeming recognition of the higher duty,

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[23] Hardy, Drainage of Oil & Gas from Adjoining Tracts—A Further Development, 1966, 6 Natural Resources Journal 45, 52-53.

[24] Professor Hardy's footnote reads:
"Billeaud Planters, Inc. v. Union Oil Co., 245 F.2d 14 (5th Cir. 1957); Gerson v. Anderson-Prichard Prod. Corp., 149 F.2d 444 (10th Cir. 1945); Cooper v. Ohio Oil Co., 108 F.2d 535 (10th Cir. 1939); Arkansas Natural Gas Corp. v. Pierson, 84 F.2d 468 (8th Cir. 1936); Hamilton v. Empire Gas & Fuel Co., 297 Fed. 422 (8th Cir. 1924); Clear Creek Oil & Gas Co. v. Brunk, 160 Ark. 574, 255 S.W. 7 (1923); Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 N.E. 381 (1909); Myers v. Shell Petroleum Corp., 153 Kan. 287, 110 P.2d 810 (1941); Leeper Oil Co. v. Rowland, 239 Ky. 295, 39 S.W.2d 486 (1931); Hood v. Southern Prod. Co., 206 La. 642, 19 So.2d 336 (1944); Deep Rock Oil Corp. v. Bilby, 199 Okla. 430, 186 P.2d 823 (1947); Chapman v. Sohio Petroleum Co., 297 S.W.2d 885 (Tex.Civ.App. 1956); Sinclair Oil & Gas Co. v. Bryan, 291 S.W. 692 (Tex. Civ. App. 1927). These and other cases are cited and discussed in 5 Williams & Meyers §§ 831-32.2, pp. 212-23."

[25] Professor Hardy's footnote reads:
"Monsanto Chem. Co. v. Andrae, 245 Miss. 11, 147 So.2d 116 (1962); Hutchins v. Humble Oil & Ref. Co., 161 S.W.2d 571 (Tex. Civ.App. 1942). In Monsanto Chem. Co. v. Sykes, 245 Miss. 207, 147 So.2d 290 (1962), on suggestion of error 247 Miss. 227, 149 So.2d 20 (1963), relief was denied even though the defendant lessee was causing the drainage. However, it appeared that some $483,000 had been expended to drill and rework the protection well which could not be put in production. The Court regarded this as due diligence in protecting the premises. This case does not really seem to be one denying that there is any significance to be attached to the fact that the lessee caused the drainage. Rather, it turns on a simple absence of sufficient proof demonstrating that the defendant had nota cted as a prudent operator. Both of the Monsanto cases, supra, impose limitations on the prior decision of Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954), in which the Mississippi Court had adopted the concept of 'fraudulent drainage.'"

[26] Professor Hardy's footnote reads.
"Olsen v. Sinclair Oil & Gas Co., 212 F.Supp. 332 (D.Wyo. 1963); Geary v. Adams Oil & Gas Co., 31 F.Supp. 830 (E.D. Ill. 1940); Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301,

these latter cases have either relaxed the requirement of proof that an offset well be profitable,[27] or negated the effect of an express offset clause freeing the lessee from any duty to drill an offset well,[28] or declared that acceptance of delay rentals with knowledge of the drainage does not waive the lessor's right to seek relief."[29]

But the commentators are no more able to reach consensus than the Courts. Professor Merrill[30] and Williams and Myers[31] criticize the notion that a lessee who itself causes drainage has any greater obligation than if the drainage were caused by a third person. Professor Seed suggests that a seprate and distinct implied obligation to

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230 S.W. 286 (1921); Annot., 19 A.L.R. 430 (1922); Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163 (1937); R.R. Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal.App.2d 246, 158 P.2d 754 (1945); Hughes v. Busseyville Oil & Gas Co., 180 Ky. 545, 203 S.W. 515 (1918) (dictum); Central Kentucky Natural Gas Co. v. Williams, 249 Ky. 242, 60 S.W.2d 580 (1933) (dictum); Phillips Petroleum Co. v. Millette, supra not 21; Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950); Dillard v. United Fuel Gas Co., 114 W.Va. 684, 173 S.E. 573 (1934); Trimble v. Hope Natural Gas Co., 113 W.Va. 839, 169 S.W. 529 (1933); Adkins v. Huntington Dev. & Gas Co., 113 W.Va. 490, 168 S.E. 366 (1932). These and other cases are collected and discussed in 5 Williams & Meyers, §§ 824-24.2, pp. 125-48."

[27] Professor Hardy's footnote reads:
"Geary v. Adams Oil & Gas Co., supra note 22; R. R. Bush Oil Co. v. Beverly-Lincoln Land Co., supra note 22; Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So.2d 176 (1954); Adkins v. Huntington Dev. & Gas Co., supra note 22. These cases are collected and discussed in 5 Williams & Meyers 127."

[28] Professor Hardy's footnote reads:
"R. R. Bush Oil Co. v. Beverly-Lincoln Land Co., 69 Cal. App.2d 246, 158 P.2d 754 (1945); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950). See discussion in 5 Williams & Meyers 128."

[29] Professor Hardy's footnote reads:
"Blair v. Clear Creek Oil & Gas Co., 148 Ark. 301, 230 S.W. 286 (1921); Trimble v. Hope Natural Gas Co., 133 W.Va. 839, 169 S.E. 529 (1933). Other cases have refused to apply other express lease clauses in situations where the drainage complained of is caused by the defendant lessee. For a full discussion of these cases, see 5 Williams & Meyers 128, 29."

[30] Merrill, Implied Covenants in Oil and Gas Leases § 111 at 260 (2d ed. 1940).

[31] 5 Williams & Meyers Oil & Gas Law § 824.2, at 144-47 (1964).

refrain from depletory acts should be imposed on the lessee.[32] Professor Hardy sees a "strong need for some sanction to inhibit a lessee from abusing his position of advantage and succumbing to the temptation to indulge his interest at the expense of one of his lessors."[33]

In Louisiana the question is no longer an open one. The issue was directly considered in Breaux v. Pan American Petroleum Corp., La. App., 1964, 163 So.2d 406. The Court concluded that the lessor has "no greater rights and no different cause of action against defendants-lessees simply because the defendants are also the lessees of the adjoining tract of land on which the alleged draining well is located." 163 So.2d at 417. The Court thoroughly considered the prior Louisiana jurisprudence in reaching this reasoned conclusion. Nor is the Breaux decision based on technicalities of pleading as plaintiffs suggest. The Louisiana Supreme Court not only denied a writ of certiorari to the lessor, but said of the Court of Appeal's judgment "We find no error of law in the judgment complained of."[34] It is therefore clear that the opinion in Breaux does not represent merely a quaint application of Louisiana procedural rules. Judge's Tate's dissent from the denial of rehearing urged this view and argued that the case should have been remanded to permit the lessor to amend the pleadings. But the Court had already said that the evi-

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[32] Seed, The Implied Covenant in Oil & Gas Leases to Refrain from Depletory Acts, 3 U.C.L.A. L.Rev. 508 (1956).

[33] Hardy, Drainage of Oil and Gas From Adjoining Tracts—A Further Development, 1966, 6 Natural Resources Journal 45, 57.

[34] Breaux v. Pan American Petroleum Corp., 1964, 246 La. 581, 165 So.2d 481.

The plaintiffs' application to the Louisiana Supreme Court for a writ of certiorari expressly urged, "The Court erred in failing to remand the case to permit plaintiffs to supply the allegations as to the money value of the oil and gas drained (the amount of which was set out in the petition); and/or to supply the allegation that defendants could have had formed a forced pooling unit, and did not do so (the petition states that nothing was done to protect plaintiffs)."

dence in the record supported the conclusions reached by the trial judge and by it and that the evidence, together with the pleadings, was simply not enough to show that the lessors were entitled to recover on the merits. There was therefore no reason to remand for amendment to the pleadings.

The Breaux case makes the conclusion irresistible, as a matter of Louisiana law, that the plaintiffs cannot recover here for breach of the implied obligation to protect the leased premises from drainage unless they can show: (1) that substantial damage has occurred, (2) that the lessee could have prevented the drainage without sustaining an economic loss and (3) the amount of royalties that the landowner would have received had the lessee taken appropriate preventive measures.

IV. Notice Requirements.

Humble next contends that the plaintiffs' suits is barred for failure to give notice of default in accordance with the terms of The Lease because Paragraph 8 of The Lease provides in part:

> "And in the event Lessor considers that operations are not being conducted in compliance with this contract, Lessee shall be notified in writing of the facts relied upon as constituting a breach hereof and Lessee shall have sixty (60) days after receipt of such notice to comply with the obligations imposed by virtue of this instrument."

Humble contends that the decision in Billeaud Planters, Inc. v. Union Oil Co. of California, 5 Cir., 1957, 245 F.2d 14, 18, and Bollinger v. Republic Petroleum Corp., La. App., 1967, 194 So.2d 139, cert. denied, 196 So.2d 277, barring any suit until such a notice is given control here.

But the lease in Billeaud provided expressly with respect to "all [lessee's] obligations hereunder BOTH EXPRESS AND IMPLIED," and the words emphasized were stressed in the Court's opinion to indicate the importance the Fifth Circuit placed on them. In addition the lease involved there expressly stated that notice was a "condition precedent to ANY ACTION BY LESSOR FOR ANY CAUSE WHATEVER." (Emphasis supplied.) Similarly the notice clause in the lease involved in Bollinger applied "in the event Lessor considers that Lessee has failed to comply with one or more of its obligations hereunder, either expressed or implied," with respect to all "claims Lessee has BREACHED THIS LEASE."

Here, however, the notice clause does not refer to implied obligations; it merely deals on its face with claims that "operations are not being conducted in compliance with this contract;" and it gives sixty days after receipt of notice "to comply with the obligations imposed by virtue of this instrument."

These differences in language may signify a profound difference in intention. But a jury might find that the parties intended the words in the present lease to mean precisely the same thing they meant by the different words used in the leases involved in Bollinger and Billeaud.

Courts sitting as triers of fact resolve such questions themselves.[36] Here the jury must determine it. Should the

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[35] Producers Oil & Gas Co., Inc. v. Continental Securities Corp., 1937, 188 La. 564, 177 So. 668; Sittig v. Dalton, 1940, 195 La. 765, 197 So. 423; Taylor v. Kimbell, 1951, 219 La. 731, 54 So.2d 1; Logan v. Blaxton, La.App., 1954, 71 So.2d 675.

[36] The Court in Billeaud said such a breach was passive. It appears that this observation was obiter dictum because having held the notice clause applicable to both express and implied obligations (which would include active as well as passive breaches) it was unnecessary to reach the issue. See Professor Hardy's Note on Billeaud in 1958, 18 La.L.Rev. 354, 357. In addition we note that its attention was

jury find as a fact that it was the intention of the parties that notice is a requisite to this particular kind of suit, and should it be established that no notice was given, then presumably the verdict would be for the defendants. If, however, the jury finds that the clause does not apply here, then it would be necessary to determine whether notice was nonetheless a requisite under Article 1931 and 1933 of the Louisiana Civil Code because the breach was passive. It is not necessary to determine at this moment whether the classification of a specific breach as active or passive is a question of law or a question of fact. However, it appears that the proper way to handle the issue ultimately will be for the Court to define the term "active" and "passive" for the jury and then require the jury to determine whether, under the facts proved, the breach (if there was one) was of one kind or the other.[37]

The lessors have suggested that, even if notice would otherwise have been required as a matter of law, Humble should be precluded from asserting that defense here because it was Humble's duty to provide them with the information on the basis of which they could have acted either to give notice or to seek unitization of the leased premises.

Humble argues that it is the duty of the lessor to maintain some contact with the premises and know what

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focused on the failure to drill an offset well, not on the affirmative act of drainage. In any event the Court did not deal with the function of judge and jury in such cases because the case had been tried by the District Court without a jury. Bollinger likewise was a nonjury case.

[37] Article 1912 of the La. Civil Code tells us, "it is a prerequisite to the recovery of damages and of profits and fruits" that a party who is charged with a breach of contract be put in default. A contract may be violated "either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done." LSA-C.C. Art. 1931. "When the breach has been passive only, damages are due from the time that the debtor has been put in default." LSA-C.C. 1933.

is occurring. It urges that the lease may, and that this lease does, require the lessor "to exercise a prudent supervision of the performance by the lessee so that, if in the lessor's opinion operations are not conducted by the lessee in accordance with the lease, the lessor may make formal written complaint and require immediate corrective action." It suggests that records available to the plaintiffs at the Louisiana Conservation Commission would have disclosed all that plaintiffs needed to know in order to give notice of breach had they wished to do so.

The plaintiffs contend that it was not their duty to examine the Conservation Commission records but that, in any event, Humble filed erroneous information with the Commission and that they could not have acted effectively on the basis of information available to them.

These contentions likewise involve questions of fact. Before they can be reached, the notice issue must be determined. If the jury finds that it was the plaintiffs' duty to give notice of a breach either because the lease required it, or because the lease did not deal with the subject and the breach was passive,[38] then the next issue will be whether, under the facts proved, Humble is precluded from enforcing the duty that would otherwise exist.

There is yet another question invoked in this aspect of the case. Louisiana Courts have long held that notice of default is not required where it would have been vain to give such notice. Where the obligee denies the existence of a contract,[39] or where it admits the contract but denies

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[38] Id.

[39] Beck v. Fleitas, 1885, 37 La.Ann. 492; Southern Sawmill Co. v. Ducote, 1908, 120 La. 1052, 46 So. 20; Johnson v. Levy, 1908, 122 La. 118, 47 So. 422; Schramm v. Toye Bros. Yellow Cab Co., La. App., 1936, 169 So. 116.

the existence of an obligation under it,[40] it is not necessary for the plaintiff to prove that he put the defendant in default. "The reason for that is that it would be inconsistent for one to deny the obligation of a contract, or to deny that he had violated the obligation, and at the same time urge that a proper demand might have brought forth a performance of the obligation on his part." Louisiana Farms Co. v. Yazoo & M.V.R. Co., 1934, 179 La. 539, 154 So. 445, 446.

On the other hand, a Louisiana Court said in Bollinger v. Republic Petroleum Corp., La. App., 1967, 194 So.2d 139, cert. denied, 196 So.2d 277, that the giving of notice and observance of the waiting period would not necessarily be a "vain and useless thing" and that the Court would not speculate on what the response of the defendant would have been had the notice and delay requirements been complied with.

This issue also does not appear appropriate for decision on motion for summary judgment. The plaintiffs may prove that it would have been fruitless for them to give notice. The defendants may satisfy the jury that such a conclusion is either speculative or wrong. In either event, the decision can be reached only when all of the facts are before the trier of fact.

Humble's motion for summary judgment for failure to give notice or to put in default is therefore Denied.

V. Duty to Unitize.

In defense against the motion for summary judgment, the plaintiffs urge that Humble owed them a duty to unit-

[40] Louisiana Farms Co. v. Yazoo & M.V.R. Co., 1934, 179 La. 539, 154 So. 445; Wadkins v. Wilson Oil Corp., 1942, 199 La. 656, 6 So. 2d 720.

ize the leased premises. Since the motion for summary judgment in this regard has been denied there is no necessity of ruling on this question in order to dispose of that motion. However, to enable the parties to determine the issues that will be submitted to the jury, I have reached the conclusion of law set forth as Number 5 above under the procedure permitted by Rule 56(d). This requires discussion of the question of whether there is a duty of a lessee who holds adjacent properties under lease to seek unitization in order to protect one property from drainage by another.

In discussing this problem, the opinion in Breaux stated, "It is conceivable . . . that the lessor would be entitled to recover damages by alleging and proving that the lessee could have created a pooling unit, thus enabling the landowner to participate in the production from the draining well, but that he failed to do so. But, even on that ground the lessor must establish the value of the minerals which he would have received if such a unit had been timely formed."[41]

The Lease does not contain a pooling clause. The language used by the Court in Breaux might however extend to a duty to secure unitization, and at least one commentator, Professor George W. Hardy, III, reads the opinion as strongly intimating this.[42] Another commentator has said:

> "The author of the authoritative treatise in this field, Professor Maurice Merrill, has advocated the position that the advent of the conservation laws has brought about the birth of a new implied duty, the duty to 'take such steps as are necessary to

[41] 163 So.2d at 415.

[42] Hardy, Drainage of Oil and Gas From Adjoining Tracts—A Further Development, 6 Natural Resources Journal 45 (1966).

> qualify him under the regulations, to secure the largest possible allowable,' and that the lessee who has stopped short of the complete exhaustion of all remedies toward this end and who has not performed all necessary administrative acts to secure prudent development has not discharged his duties to the lessor. Arguments supporting the fifth implied covenants are that the exclusiveness of the lessee's operating rights, and its access to most of the pertinent data relating to the leased minerals, render him the only person qualified to represent the interests of the owner in matters pertaining to production of minerals from the land. Although considerable controversy surrounds this new obligation of the lessee, it has been judicially accepted in a few states." (Footnotes omitted.)[43]

The implied obligation of the lessee to protect the leased premises from drainage is coupled with its obligation to use them as a prudent administrator; hence there may be an obligation on the part of the lessee who is producing from adjacent property to take some action once it learns, as it alone best knows that it is draining oil or gas from premises that it has a duty to protect. The lessee might conceivably discharge its duty to act as a prudent administrator in various ways. It might drill an offset well or effect an additional completion of an existing well. If it thinks either that this is inadvisable under the circumstances or that it cannot be done profitably, it might have a duty to seek unitization. If it does not, then the facts may indicate that a prudent administrator would make full disclosure to the lessor (directly or by filing sufficient information with the Commissioner of Conservation) in order to enable the lessor to take such action on this information as the lessor may deem appropriate, if

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[43] George, The Impact of Conservation Laws and Decisions Upon the Mutual Obligations of the Mineral Lease, 1964, 24 La.L.Rev. 571, 576.

any, perhaps by seeking unitization,[44] or by giving notice of the breach of the lease if the lessor considers that such a breach has occurred. The nature and extent of the lessee's duties depend entirely on the facts and figures, and on what a prudent administrator in the same position would do.

Consequently, the jury should be charged that the mineral lessee who is leasing adjacent tracts and is producing oil or gas from a well on one tract that drains the other has a duty to act as a prudent administrator in order to protect the owner of the tract being drained by taking such steps as a prudent administrator would take under the circumstances then prevailing. If the lessee has not acted as a prudent administrator, but has persisted in the drainage, then as set forth in the Breaux case: "[T]he measure of damages which the lessor sustains because of a breach by the lessee of this implied obligation is the value of the minerals or royalties which the lessor would have received had the lessee complied with his obligation under the lease."[45]

This opinion will serve as an order on the motion for summary judgment.

ALVIN B. RUBIN,
United States District Judge.

New Orleans, Louisiana,
August 27th, 1968.

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[44] LSA-R.S. 30:6F.

[45] Breaux v. Pan American Petroleum Corp., La.App., 1964, 163 So.2d 406, 415.

APPENDIX "B"

Louisiana Civil Code Articles

1911. "The debtor may be put in default in three different ways; by the term of the contract, by the act of the creditor, or by the operation of law.

"1. By the terms of the contract, when it specially provides that the party, failing to comply, shall be deemed to be in default by the mere act of his failure.

"2. By the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

"3. By the operation of law. This takes place in cases where the breach of the contract alone is by law declared to be equivalent to a default. The law having declared that the neglect to return a thing loaned for use, at a stipulated time, or the application of it to another use than the one for which it was lent, puts it at the risk of the borrower; this, without any act of the lender, puts the borrower in default, and forms an example of this part of the rule."

1930. "The obligation of contracts, extending to whatsoever is incident to such contracts, the party who violates them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default."

1931. "A contract may be violated, either actively by doing something inconsistent with the obligation it has proposed, or passively by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract."

1932. "When there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action."

1933. "When the breach has been passive only, damages are due from the time that the debtor has been put in default, in the manner directed in this chapter." * * *